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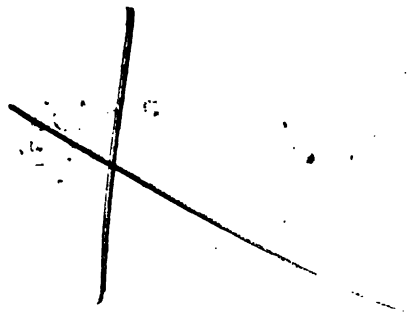

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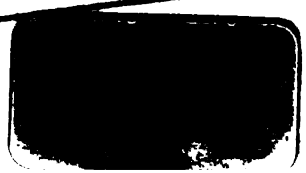

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MASSACHUSETTS REPORTS

158

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JANUARY 1893 — APRIL 1893

GEORGE F. TUCKER

REPORTER

BOSTON

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

ALBERT LITTLEFIELD *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. November 16, 17, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Transportation of Milk — Penal Statute — Petition to and Order of Board of Railroad Commissioners — Irregularity of Proceedings fatal to Action.

The authority of the Board of Railroad Commissioners, under the Pub. Sts. c. 112, §§ 192, 193, 194, is not to consider the general subject of rates, but to "ascertain at what rates facilities for the carriage of milk under contract or in large quantities are furnished by the railroad corporation," and to compare them with the tariff for the carriage of milk by the can, to fix rates by the can "fairly proportionate with such contract or large quantity rates." The order when made is to have the force and effect of a criminal statute, which calls for strictness and regularity in proceedings under it.

In the record of hearings before the Board of Railroad Commissioners on a petition asking for the revision and fixing of tariff rates for the forwarding of milk over a railroad, there was nothing to indicate that the railroad had notice of the petition, or an opportunity of being heard before the board. In an action against the railroad to recover a penalty under the Pub. Sts. c. 112, § 194, for non-compliance with the order of the board, there was no allegation in the declaration to show that the defendant had such notice or opportunity to be heard. *Held*, on demurrer, that, while from what occurred at the argument the court might suppose that the defendant was before the commissioners, yet it could not go outside of the record before it, and that the order was invalid for want of a notice to the defendant.

In a petition to the Board of Railroad Commissioners for the revision and fixing of

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tariff rates for the forwarding of milk over a railroad, there was nothing to show to what railroad the petition referred, or in what part of the State, or in what direction the petitioners desired to forward milk, or, except by inference, that they desired to forward it anywhere. The petitioners described themselves as producers of and dealers in milk, but besides that there was nothing to show what interest they had in the subject to which the petition related. The order of the board recited that the petition was signed by residents of seven towns mentioned, but did not state to what railroad it related, although there was language from which it might be inferred that a former proceeding of a similar charac'er against the same defendant was intended to apply. The order did not expressly state to what place the milk was to be carried at the rate fixed, although Boston was apparently meant; and the only designation of the places from which milk was to be carried was "the stations covered by the present petitions," which was supposed to mean the stations in the towns where, according to the recital in the order, the petitioners resided. From some of these towns another railroad ran to Boston, and it was not stated whether the order was to apply to transportation over that railroad or not. *Held*, that the proceedings were not sufficiently regular and formal, and the order was not sufficiently explicit, to be made a foundation for the recovery of the penalties prescribed by the Pub. Sts. c. 112, § 194.

APPEAL from a decision sustaining the defendant's demurrer to the plaintiff's declaration. The declaration was as follows:

"And the plaintiff says that at the times hereinafter mentioned, and for many years prior thereto, the defendant was a railroad corporation and a common carrier of goods, wares, and merchandise for hire, duly established under the laws of the Commonwealth, and owned, managed, and operated a railroad extending from and between Littleton, Acton, West Acton, South Acton, Boxboro', Rockbottom, and Stowe, to said city of Boston, all of said cities and towns being in said Commonwealth and on the line of said railroad; that as such railroad corporation and common carrier the defendant was bound to receive, carry, forward, and deliver milk on its said railroad for any person tendering the same; that during the time, and on the several dates hereinafter mentioned, and for a long time prior thereto, the defendant did receive, carry, forward, and deliver milk by contract, by the can and in larger quantities, on its said railroad to said Boston, at certain fixed rates, being the same rates of the various times herein mentioned established by said defendant corporation; that the defendant corporation was also bound by law to receive, forward, and deliver milk by the can when duly tendered for transportation, at such tariff rates as the Board of Railroad Commissioners of Massachusetts might revise,

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fix, and determine according to law, and of which it should be duly notified by said board; that on or about the twenty-sixth day of May, A. D. 1891, on the petition of the plaintiff and others desiring to forward milk over said railroad, and by virtue of the power and authority vested in it by law, said Board of Railroad Commissioners of Massachusetts ascertained at what rates facilities for the carriage of milk under contract or in large quantities were furnished by the defendant corporation, compared the same with the tariff established by the defendant as aforesaid for the carriage of milk by the can from and to the same places on said railroad, including a reasonable compensation for the care of the same, and found that the said tariff for care and carriage by the can was unreasonably more than the said rate for its carriage under contract or in larger quantities, and thereupon revised said tariff for care and carriage by the can, and fixed the rates therefor fairly proportionate with such contract or large quantity rates, mamely, from Littleton, Acton, West Acton, South Acton, Boxboro', Rockbottom, and Stowe to said Boston, at the sum of three cents per can; that on or about the twenty-ninth day of May, 1891, the defendant was duly notified of said tariff rates, thus revised and fixed by the said Board of Railroad Commissioners according to law; that subsequently, and while said tariff rates thus revised and fixed by said board were in force, namely, from the first to the ninth of October, inclusive, 1891, at the railroad station or depot of the defendant corporation at said West Acton, the plaintiff tendered to the defendant for transportation from said West Acton to the said city of Boston a certain quantity of milk by the can, contained in and making in all four hundred and forty-one cans of milk; that upon tendering said cans of milk, the plaintiff at the same time also tendered to the defendant for the transportation of the same the said tariff rates therefor, revised and fixed by said Board of Railroad Commissioners as aforesaid, namely, three cents per can; that thereupon the defendant refused and neglected to receive, forward, or deliver said cans of milk as requested, at the said tariff rates so fixed and notified to it by said board and tendered as aforesaid, to the great damage and injury of the plaintiff, whereby the defendant, by virtue of the statutes in such case made and provided, forfeited and became liable to pay to the plaintiff ten dollars for

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each of said cans, amounting in all to the sum of four thousand four hundred and ten dollars."

According to the report of the Board of Railroad Commissioners, four hearings were held in 1891, the petition being as follows: "We, the undersigned, producers of and dealers in milk in Massachusetts, respectfully represent that the freight for the carrying of milk in cans charged by the railroads is exorbitant and unjust, so ask that the same be reduced to a reasonable amount." The petition, which was signed by residents of the seven towns named in the declaration, recited the manner in which the milk business was carried on in those towns, and declared that the complaint came from the farmers, who desired to freight their milk to the city on their own account.

The first cause of complaint was that the existing system was in itself objectionable. The report recited the action of the board in 1873 on the petition of the Milk Producers Association, and also quoted liberally from its findings upon the complaint of certain farmers in Worcester County in 1878. The report further recited that it was in consequence of the decision of the board in 1878 that the act was passed, now found in the Pub. Sts. c. 112, §§ 192, 193, 194; that in 1881 the position was reaffirmed that farmers have the right to transportation, with reasonable facilities, without the intervention of any contractor or middleman, and that the principles thus asserted led to the adoption of the present system, under which the farmer can buy milk tickets from the railroad company, and look to it for the safe transportation and proper handling of his milk. The report further stated: "In the words of the finding of the board in the case of *J. W. Adams and others* v. *Fitchburg Railroad*, under date of July 26, 1882, it is the right of the producers to have their milk carried by the railroad company at a fixed rate, to be paid directly to it. This right the producers now enjoy. The companies must, however, bear in mind that the agents whom they select to care for the milk thus consigned to them are agents whose interests are, in some respects, adverse to the interest of the consignors. The contractor wishes to have farmers sell milk to him rather than to freight it to the city and sell it there to his competitors. So

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long, therefore, as the present system continues, the acts of the agents of the railroad companies will be open to suspicion, and it is natural that there should be frequent complaints."

The second cause of complaint was that the rates charged for the transportation of single cans were exorbitant as compared with the rates charged for the transportation of milk in large quantities. The report recited that, "On the complaint of *J. W. Adams and others* v. *Fitchburg Railroad*, this board in 1882 fixed the rate from Littleton and stations in Acton, at five cents per can, to be paid in advance by the purchase of tickets"; that it was now asked to reduce the tariff so fixed; that, in rendering the decision in the above case, the board held that it had no power to require a railroad company to ice milk, and that it now reversed its decision, holding that "reasonable care," in the Pub. Sts. c. 112, § 192, included the warming of the car in winter and its artificial cooling in summer. The report concluded as follows: "To fix the price per can at three cents would make the rate per single can twenty-three per cent higher than the rate per can when taken in car-load lots, and this, in the opinion of the board, would be a fairly proportionate rate, considering the character of the business. . . . The board therefore fixes the rate per can from the stations covered by the present petitions at three cents, which rate is to include carriage, care as defined above, and the return of the cans."

The defendant demurred to the plaintiff's declaration, on the ground that the order of the board was illegal and void; "because the board, upon a general petition applicable to all places in the Commonwealth from which milk is transported, made a decision applicable to certain specified towns only; because the price fixed by the board included the icing of the milk and the return of the cans, and the board had no authority to fix the price for such service; because no price was fixed by the board for the carriage of milk exclusive of other service; because the board ordered the defendant to furnish ice, which it had no authority to do; because it does not appear that any notice was given to the defendant, or that any person was present in behalf of the defendant at the hearing; because no time was fixed in the decision at which said rates shall take effect, nor was it stated how long they should continue; because it was not stated

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in said order to what stations the milk was to be transported at said rates; and because in said order no reference was made to the defendant, and the order did not purport to apply to the defendant."

The Superior Court sustained the demurrer; and the plaintiff appealed to this court.

J. A. McGeough, for the plaintiff.

G. A. Torrey, for the defendant.

KNOWLTON, J. The provisions of the Pub. Sts. c. 112, § 192, are intended to secure to every person desiring to transport milk in small quantities by the can on a railroad the right to have it carried by the can "under fairly proportionate advantages in every respect, including price, time, and reasonable care for the same, as the milk carried in large quantities, or under contract." Section 193 authorizes the railroad commissioners, under certain circumstances, to revise the tariff, and § 194 imposes a penalty of ten dollars for each and every can of milk which the railroad company refuses to receive or neglects to forward or deliver at the rates established by the railroad commissioners.

The plaintiff in the present case seeks to recover $4,410, the amount of the penalties incurred by the defendant in eight days for refusing to transport for him four hundred and forty-one cans of milk, on which the freight at the tariff rate would have been about thirteen dollars. The statute is highly penal, and it calls for strictness and regularity in proceedings under it. Some of the questions arising in this case we do not deem it necessary to consider; for if we assume, without deciding, that the railroad commissioners were correct in their general view of the law, we are of opinion that the plaintiff is not entitled to the penalties which he seeks to recover. Under the Pub. Sts. c. 112, § 193, the railroad commissioners exercise a peculiar jurisdiction. They may make an order which will subject the railroad corporation to heavy penalties. This jurisdiction attaches only "on the petition of a person desiring to forward milk over a railroad." The proceeding is directed against a particular railroad on a petition of a person who claims a particular right against that railroad. The authority of the board is not to consider the general subject of rates, but to "ascertain at what rates facilities for the carriage

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of milk under contract or in large quantities are furnished by the railroad corporation," and to compare them with the tariff for the carriage of milk by the can, to fix rates by the can "fairly proportionate with such contract or large quantity rates." The order, when made, is to have the force and effect of a criminal statute. The inquiry relates to the dealings of a particular railroad; for the special contracts of one railroad with shippers presumably are not the same as those of another railroad.

In a hearing of this kind common justice requires that a railroad against whom the proceeding is directed should be notified of the petition, and have an opportunity of being heard. In the present record there is nothing to indicate that the defendant had notice of the petition, or an opportunity of being heard before the railroad commissioners. If it was notified, the failure of the order of the railroad commissioners to show it might be cured by an allegation in the declaration; but there is no such allegation. Perhaps the full record of the railroad commissioners may show notice and a hearing of the defendant; but if it does, it is not before us. From what occurred at the argument, we may suppose that the defendant was before the commissioners; but on a demurrer we cannot go outside of the record before us. So far as appears, the order was invalid for want of a notice to the defendant.

The petition is not in a form to show that the commissioners had jurisdiction. There is nothing in it to show to what railroad it refers, or in what part of the State, or in what direction the petitioners desired to forward milk, or, except by inference, that they desired to forward it anywhere. The petitioners describe themselves as producers of and dealers in milk; but besides that there is nothing to show what interest they have in the subject to which the petition relates. The order recites that the petition was signed by residents of seven towns, which are mentioned. Apparently this fact was ascertained from evidence outside of anything contained in the papers before the commissioners. The order does not anywhere expressly state to what railroad it relates. In it there is a reference to a former proceeding of a similar character before the railroad commissioners in 1882 against this defendant, and there is language

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from which it may be inferred that this order is intended to apply to the defendant. It is not expressly stated in the order to what place the milk is to be carried at the rate fixed, although from the general discussion and statement of reasons in the order, we suppose that Boston is meant; and the only designation of the places from which the milk is to be carried is "the stations covered by the present petitions," which doubtless means the stations in the towns where, according to the recital in the order, the petitioners reside. From some of these towns another railroad runs to Boston, and it is not stated whether the order is to apply to transportation over that railroad or not. The whole proceedings are more appropriate to a case arising under the general jurisdiction of the railroad commissioners, where their action is advisory, than to this peculiar jurisdiction, where an order may be made which will have the effect of a highly penal statute.

So far as we can judge from the record before us, the proceedings were not sufficiently regular and formal, and the order was not sufficiently explicit to be made a foundation for a recovery of the penalties prescribed by the statute.

Judgment for the defendant.

JOHN T. CONNOLLY *vs.* NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Norfolk. November 17, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Crossing at Station — Negligence of Defendant.

In an action against a railroad for personal injuries it appeared in evidence that at the place of injury, a station, there were two tracks. The plaintiff having been travelling from Boston on the westerly and outward track alighted on the easterly side, between the two tracks, and started to cross the easterly track, when he was run down by an incoming train. On the side toward which the plaintiff was going were the station and a flight of steps leading in the direction of the plaintiff's home. On the westerly side was a long platform opposite the station, extending to the highway. The gates at the end of the plaintiff's car were open

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on both sides. The plaintiff knew the premises, and walked back through the train to this car to cross the track, as others were in the habit of doing. He testified that, as he was going down the steps, he looked around and did not see anything; but it appeared that if he had looked before going upon the eastern track he could not have failed to see the approaching train in time to avoid danger. It was six in the evening, and the night was dark and misty, but there was a lighted headlight on the incoming engine. There was a rule of the road that a train should not pass another which was discharging passengers at a station, and the plaintiff knew that trains were not accustomed to pass. The plaintiff was not shown to have known of the rule, and it did not seem to be material except as bearing upon the defendant's negligence, which was admitted. *Held*, that the judge rightly directed a verdict for the defendant.

A person is not warranted in assuming that trains will not cross each other at a station, and in shutting his eyes and walking ahead on that assumption.

TORT, for personal injuries occasioned to the plaintiff by being run down by the defendant's locomotive engine at the station on the defendant's road at Readville.

Trial in the Superior Court, before *Maynard*, J., who directed a verdict for the defendant; and the plaintiff alleged exceptions, the material portions of which appear in the opinion.

The case was argued at the bar in November, 1892, and afterwards was submitted on the briefs to all the judges.

J. P. Leahy, (*M. Galligan* with him,) for the plaintiff.

F. A. Farnham, for the defendant.

HOLMES, J. This is an action for personal injuries, and the question is whether the plaintiff should have been allowed to go to the jury, or whether there was no sufficient evidence of due care on his part. The defendant's negligence is admitted. At the place of the injury, which was the Readville station on the defendant's road, there were two tracks. The plaintiff had been travelling away from Boston on the westerly of the two, which was the outward track. He alighted on the easterly side, between the two tracks, and started to cross the easterly track, when he was run down by an incoming train. On the side toward which the plaintiff was going were the station and a flight of steps leading down to the highway in the direction of the plaintiff's home. On the westerly side was the usual long platform opposite the station, extending to the highway, where it crossed the track, or nearly to that point. The distance between the inward and outward tracks was eleven feet and four inches. There were gates at the end of the plaintiff's car, but they were not in use and were open on both sides. The plaintiff

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was familiar with the premises, and walked back through the train to this car, with the purpose of crossing the track as he attempted to do, and as other people who lived on the easterly side of the railroad were in the habit of doing. According to his testimony, as he was going down the steps of the car, he looked around and did not see anything. There is no evidence of any further looking, and it plainly appears, from inspection of the photograph which was exhibited, that, if the plaintiff had looked before going upon the eastern track, he could not have failed to see the approaching train in time to avoid danger. It was six o'clock in the evening, and the night was dark and misty, but there was a lighted headlight on the incoming engine. The main fact relied on by the plaintiff was that the gate was open. But as the gates were not used on that train, and as the fact seems to have been notorious, it may be questionable whether they can have been taken by the plaintiff to convey any assurance whatever. The most which he could have been warranted in understanding it to assert was, that he could alight in safety, and that assertion was true, as there was plenty of room between the tracks. After he had alighted, to be sure, there was nothing to hinder him from crossing the eastern track, but neither would there have been anything had the plaintiff left his train on the other side. So the question comes down to this, — whether a person is warranted in assuming that trains will not cross each other at a station, and in shutting his and walking ahead on that assumption. That question was in *Debbins* v. *Old Colony Railroad*, 154 Mass. 402. See v. *Old Colony Railroad*, 156 Mass. 178; *Tyler* v. *Railroad*, 157 Mass. 336. For although the plaintiff came in from the outside when the gate across the closed, as he knew, it was assumed that he entered the purpose of taking a train which was there, might have found that he was warranted in gate was closed on account of the train which to take, so that his knowledge or warning was plaintiff's in the case at bar. Moreover, if was a rule of the road in that case as in not pass another which was discharging and the plaintiff knew that trains were

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But as the plaintiff here is not shown to have known of the rule, and as, if he did know of it, it was not passed for the purpose of conveying any assurance to him and did not purport to convey any, it does not seem to be material except as bearing on the defendant's negligence, which is admitted. In the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

THOMAS F. MORRIS & another *vs.* JOHN McCARTY & another.

Suffolk. November 17, 18, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Real Action — Tenancy by the Entirety — Statute — Joint Tenancy.

On a writ of entry it ared that the deed in question, given in 1886, was to A. and B., wife of A., " ts by the entirety and not as tenants in common." The grantees were n t husband and wife. Under the St. of 1885, c. 237, a deed will create e in common, unless by its true construction it is expressed therein grantees are to take the land jointly or as joint tenants, or to them an rivor of them, or unless it manifestly appears from the tenor of the i that it was intended to create an estate in joint tenancy. *Held*, that th the deed was to create an estate in joint tenancy, without the special f an estate in entirety.

WRIT C Y, to recover an d half of a parcel of land in B

The c ard in the Sup rt, without a jury, by *Sherma* found that th ants were children, and the on Mary Ann the alleged wife of the tenan Carty; that the land, dated January 16, 1 ade to th nd Mary Ann McCarty, his all material hich are as follows: " Know all e presen , George Curtis and Solomon s, in c of twenty-five hundred dollars nd Mary Ann McCarty, wife of argain, sell, and convey unto the ary Ann McCarty, as tenants by nts in common, a certain parcel of

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was familiar with the premises, and walked back through the train to this car, with the purpose of crossing the track as he attempted to do, and as other people who lived on the easterly side of the railroad were in the habit of doing. According to his testimony, as he was going down the steps of the car, he looked around and did not see anything. There is no evidence of any further looking, and it plainly appears, from inspection of the photograph which was exhibited, that, if the plaintiff had looked before going upon the eastern track, he could not have failed to see the approaching train in time to avoid danger. It was six o'clock in the evening, and the night was dark and misty, but there was a lighted headlight on the incoming engine. The main fact relied on by the plaintiff was that the gate was open. But as the gates were not used on that train, and as the fact seems to have been notorious, it may be questionable whether they can have been taken by the plaintiff to convey any assurance whatever. The most which he could have been warranted in understanding it to assert was, that he could alight in safety, and that assertion was true, as there was plenty of room between the tracks. After he had alighted, to be sure, there was nothing to hinder him from crossing the eastern track, but neither would there have been anything had the plaintiff left his train on the other side. So the question comes down to this, — whether a person is warranted in assuming that trains will not cross each other at a station, and in shutting his eyes and walking ahead on that assumption. That question was answered in *Debbins* v. *Old Colony Railroad*, 154 Mass. 402. See also *Young* v. *Old Colony Railroad*, 156 Mass. 178; *Tyler* v. *Old Colony Railroad*, 157 Mass. 336. For although the plaintiff in that case came in from the outside when the gate across the highway was closed, as he knew, it was assumed that he entered rightfully for the purpose of taking a train which was there, and the jury well might have found that he was warranted in assuming that the gate was closed on account of the train which he saw and meant to take, so that his knowledge or warning was no more than the plaintiff's in the case at bar. Moreover, if it be material, there was a rule of the road in that case as in this, that a train should not pass another which was discharging passengers at a station, and the plaintiff knew that trains were not accustomed to pass.

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But as the plaintiff here is not shown to have known of the rule, and as, if he did know of it, it was not passed for the purpose of conveying any assurance to him and did not purport to convey any, it does not seem to be material except as bearing on the defendant's negligence, which is admitted. In the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

THOMAS F. MORRIS & another *vs.* JOHN McCARTY & another.

Suffolk. November 17, 18, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Real Action — Tenancy by the Entirety — Statute — Joint Tenancy.

On a writ of entry it appeared that the deed in question, given in 1886, was to A. and B., wife of A., "as tenants by the entirety and not as tenants in common." The grantees were not in fact husband and wife. Under the St. of 1885, c. 287, a deed will create an estate in common, unless by its true construction it is expressed therein that the grantees are to take the land jointly or as joint tenants, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy. *Held*, that the effect of the deed was to create an estate in joint tenancy, without the special features of an estate in entirety.

WRIT OF ENTRY, to recover an undivided half of a parcel of land in Boston.

The case was heard in the Superior Court, without a jury, by *Sherman*, J., who found that the demandants were children, and the only heirs of Mary Ann McCarty, the alleged wife of the tenant John McCarty; that a deed of the land, dated January 16, 1886, was made to the tenant and Mary Ann McCarty, his alleged wife, the material parts of which are as follows: "Know all men by these presents, that we, George Curtis and Solomon Bolster, trustees, in consideration of twenty-five hundred dollars to us paid by John McCarty and Mary Ann McCarty, wife of the said John, hereby grant, bargain, sell, and convey unto the said John McCarty and Mary Ann McCarty, as tenants by the entirety and not as tenants in common, a certain parcel of

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land, . . . to have and to hold the above granted premises, with all the privileges and appurtenances thereto belonging, to the said John McCarty and Mary Ann McCarty as tenants by the entirety and not as tenants in common, and their heirs and assigns, to their own use and behoof forever"; that at the time the marriage ceremony took place between John and Mary Ann McCarty, in 1875, Mary Ann was married to Daniel Leahy who was then and continued for some years to be alive; that Mary Ann and John McCarty continued to live together as man and wife, and the parties agreed that it might be assumed that all the parties to the deed believed that the two were husband and wife; but the judge found that John and Mary Ann were never legally married. Both Leahy and Mary Ann McCarty died before the date of the writ.

The judge found for the tenants, and reported the case for the determination of this court. If the finding for the tenants was erroneous as matter of law, on the facts found and above stated, and a finding should have been made for the demandants, then the finding was to be set aside and judgment was to be entered for the demandants.

W. H. Brown, for the demandants.

W. S. Frost, for the tenants.

ALLEN, J. The deed could not have the effect to create an estate in entirety, because the grantees were not in fact husband and wife, though described as such by the grantors. The question therefore is whether the grantees became joint tenants or tenants in common.

The deed was given in 1886, and is therefore subject to St. 1885, c. 237, under which a deed must be construed to create an estate in common, unless, by its true construction, it is expressed therein that the grantees are to take the land jointly or as joint tenants, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy.

An estate in entirety is an estate in joint tenancy, but with the limitation that during their joint lives neither the husband nor the wife can destroy the right of survivorship without the assent of the other party. *Donahue* v. *Hubbard*, 154 Mass. 537, and cases there cited. The doctrine of survivorship is the dis-

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tinguishing incident of title by joint tenancy. 4 Kent Com. 360. On looking at the deed under which the tenant claims, it is quite plain that the grantors intended to create an estate in joint tenancy, as distinguished from an estate in common. The particular form of estate in joint tenancy which they contemplated fails; but they took great pains to exclude the idea of an estate in common, and the effect of the deed is to create an estate in joint tenancy, without the special features of an estate in entirety. *Judgment affirmed.*

WARD W. HAWKES *vs.* JOHN C. SPRAKER.

Middlesex. November 18, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mechanic's Lien — Issues — Motion for New Trial.

If, in a petition to enforce a mechanic's lien for the labor furnished pursuant to a written entire contract to furnish the labor and materials for plumbing certain houses, an issue submitted to the jury and answered by them in the negative is identical with that for which it was substituted with the assent of the parties, the party aggrieved by the verdict has no ground of exception.

PETITION to enforce a mechanic's lien for the labor furnished pursuant to a written entire contract to furnish the labor and materials for plumbing certain houses in Malden. At the trial in the Superior Court, before *Bond*, J., there was evidence tending to show that the case had been tried before an auditor upon ten certain issues agreed to by the parties, and the auditor had answered the tenth issue in the affirmative. The tenth issue was as follows: "Does it appear that the petitioner, who filed in the Middlesex County Registry of Deeds a statement of an account of the amount due him, has wilfully and knowingly claimed more than his due?"

At the commencement of the trial, the presiding judge suggested that there were too many issues, and that they should be lessened, to which both parties assented, and, after the evidence had closed, the presiding judge exhibited to both counsel three

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issues, the second of which was as follows: "*Q.* Did the petitioner, in the statement which he filed in the registry of deeds, of the amount due him for labor, wilfully and knowingly claim more than was due him for such labor? *A.* No."

The respondent's counsel assented to these three issues, believing that the second was identical with the tenth of the original issues.

The judge in instructing the jury read to them the three new issues, and commented on them separately. Neither the respondent nor his counsel discovered that the new second issue differed from the original tenth issue until two or three days after the verdict, whereupon the respondent filed a motion for a new trial, alleging the above facts and making affidavit thereto, and alleging that the original tenth issue was the proper legal issue to have been submitted to the jury, and that the new second issue was not the proper legal issue, and that he had been aggrieved by the substitution, and that the trial was a mistrial. After hearing, the judge ruled that the new second issue was the proper legal issue to submit to the jury, and that therefore the respondent had no legal cause to complain of the change from the original tenth issue, and overruled the motion. The respondent alleged exceptions.

W. S. Stearns & J. H. Butler, for the respondent.

J. W. Keith, (*C. Abbott* with him,) for the petitioner.

BARKER, J. In legal effect, the issue submitted to the jury was identical with that for which it was substituted with the assent of the parties. The exceptions are frivolous.

Exceptions overruled, with double costs.

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MARGARET M. LIDDLE *vs.* OLD LOWELL NATIONAL BANK.

Middlesex. November 18, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Admissions showing Inconsistency.

In an action for personal injuries the plaintiff's physician was asked, upon cross-examination, if he did not say to a patient that he did not believe the plaintiff could get anything out of the defendant, because he could not make him stay in bed. He replied that he could not remember. The defendant called the patient, who testified that the physician said to him, in answer to a question, that if the plaintiff had been hurt badly enough to be confined to his bed, he might recover. *Held*, that the evidence was admissible to show statements by the physician more or less inconsistent with his testimony, in that they treated the plaintiff's injury as less serious than he represented it on the stand.

TORT for personal injuries occasioned to the plaintiff on or about November 6, 1890. At the trial in the Superior Court, before *Braley*, J., it appeared in evidence that one Elisa Forbes had brought an action for damages against the defendant for injuries alleged to have been received by her through the defendant's negligence at the same time when, and by the same causes by which, the plaintiff claimed to have been injured.

The plaintiff called as a witness one Bartlett, a physician, who testified that he attended the plaintiff at various times subsequent to the injuries complained of, and testified as to the nature and extent of the injuries; among other things, he stated that the plaintiff came to his office early in the afternoon on the day of the accident; that he found on examining her nothing but internal injuries; that he saw her the next day at her residence, when he found her right shoulder injured, her hip beginning to show signs of discoloration, her hip and shoulder swollen, severe pains through her hips, shoulder, lungs, and chest; that in his opinion there was tuberculosis, extensive bronchitis in both lungs, and dulness in both lungs; that her system was reduced, and that there was no other cause for these conditions than the accident.

"*Q.* Do you know Mattie Stackpole? *A.* Yes.

"*Q.* Patient of yours? *A.* She has been; yes.

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"*Q.* Ever talked with her about this woman, Mrs. Liddle? *A.* Never; not as I remember. I never remember of mentioning it.

"*Q.* Did you not say to her that you did not believe Mrs. Liddle could get anything out of the bank, because you could not make her stay in bed? (Objected to, but admitted.) *A.* I could not remember.

"*Q.* Will you say that you did not? *A.* I won't say that I did not; I do not remember."

The defendant called as a witness one Mattie Stackpole, referred to above, and her examination proceeded as follows:

"*Q.* Have you been to Dr. Bartlett's office? *A.* Yes, sir.

"*Q.* At any time when you were there, did he say anything to you about Mrs. Liddle? (Objected to, but admitted.) *A.* I went to him for a prescription, and in conversation I brought it up myself, and asked him if he thought either one of the ladies would get anything that was hurt, and, in answering, he just merely said — well, I don't know as he said anything about Mrs. Forbes — but he said if Mrs. Liddle had been hurt bad enough to have been confined to her bed, she might have. That was all that was said."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. F. Manning, for the plaintiff.

G. F. Richardson, for the defendant.

HOLMES, J. The question put to the doctor on cross-examination, and the evidence of the witness Stackpole, were intended to show admissions or statements by the former more or less inconsistent with his testimony, in that they treated the plaintiff's injury as less serious than he represented it on the stand. For this purpose, the questions were admissible. So far as the answers possibly could have prejudiced the plaintiff, if at all, it was by showing such an inconsistency. An inconsistency need not be expressed in contradictory propositions; it is enough if the implications of what has been said tend in a different direction from what is sworn to.

Exceptions overruled.

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JOHN H. BROULT *vs.* CHARLES H. HANSON & another.

Middlesex. November 18, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Collision of Teams — Statute — Prima Facie Evidence — Burden of Proof.

In an action for damages occasioned by a collision, in a public street, it appeared that both teams were left unattended, and that, at the time of the collision, no persons met each other travelling with the vehicles which collided. The plaintiff requested the judge to instruct the jury, first, that if the defendant's team, passing along unattended, came in contact with the plaintiff's team, which was left standing at the side of the street on the left hand of the defendant's team as it approached, that would be *prima facie* evidence of the defendant's negligence; secondly, that the burden would be on the defendant to satisfy the jury that he was not negligent. *Held*, that the provisions of the Pub. Sts. c. 93, § 1, which relate to persons "travelling with carriages," etc., had no application, and that the burden of proof remained on the plaintiff as well after as before the introduction of *prima facie* evidence of negligence; that a *prima facie* case calls for evidence on the other side to meet it; and that if evidence of equal weight is introduced so that the two sides are in even balance, the plaintiff fails.

TORT, for injuries occasioned to the plaintiff's horse and wagon by collision with the defendants' team. At the trial in the Superior Court, before *Braley*, J., the jury returned a verdict for the defendants; and the plaintiff alleged exceptions. The material facts appear in the opinion.

J. F. Manning, for the plaintiff.

F. W. Qua, for the defendants.

KNOWLTON, J. The instruction requested by the plaintiff involves two propositions: first, that if the defendants' team, passing along unattended, came in contact with the plaintiff's team, which was left standing at the side of the street on the left hand of the defendants' team as it approached, that would be *prima facie* evidence of the defendants' negligence. Secondly, that in such a case the burden would be on the defendants to satisfy the jury that they were not negligent.

To support the first proposition, the plaintiff relies on the Pub. Sts. c. 93, § 1, which require that, "when persons meet each other on a bridge or road, travelling with carriages, wagons, carts, sleds, sleighs, or other vehicles, each person shall seasonably

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drive his carriage or other vehicle to the right of the middle of the travelled part of such bridge or road," etc. We are of opinion that this statute is not applicable to the present case, in which it is agreed that both the teams were left unattended, and that, at the time of the collision, no persons met each other travelling with the vehicles which collided. *Lovejoy* v. *Dolan*, 10 Cush. 495. *Garrigan* v. *Berry*, 12 Allen, 84.

It is not argued that the slow movement of a heavy team along a street with a driver temporarily absent would in itself alone be *prima facie* evidence of negligence on the part of the driver; see *Southworth* v. *Old Colony & Newport Railway*, 105 Mass. 342; but if it would, the instruction requested could not have been given; for it has often been decided that, in a case of this kind, the burden of proof remains on the plaintiff, as well after as before the introduction of *prima facie* evidence of negligence. A *prima facie* case calls for the introduction of evidence on the other side to meet it. If evidence of equal weight is introduced, so that the two sides are in even balance, the plaintiff fails. *Powers* v. *Russell*, 13 Pick. 69. *Central Bridge* v. *Butler*, 2 Gray, 130. *Nichols* v. *Munsel*, 115 Mass. 567. *Exceptions overruled.*

COMMONWEALTH *vs.* JAMES LOWREY & another.

Suffolk. November 22, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Indictment — Breaking and Entering — Verdict — Inconsistent Counts.

On an indictment for breaking and entering, it appeared in evidence that, in pursuance of a preconcerted scheme, A., making a pretence of a wish to purchase an article, got the night clerk at a shop to let him in at about midnight, and that, while the clerk was in the cellar getting the article, A. unbolted the door which had been rebolted behind him after his admission and let in B., who concealed himself and remained behind when A. left, and afterwards broke open the money-drawer. *Held*, that in order to convict B it was not necessary that he should have touched the door, if he procured himself to be let in by an accomplice and entered with felonious intent. *Held, also*, that A., the accomplice inside the house, was guilty of the same offence.

If, on an indictment for breaking and entering, there can be said to be any invitation

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to enter a closed and bolted shop at midnight, the invitation does not extend to thieves when let in by accomplices.

If facts necessary to sustain verdicts of guilty upon two counts are inconsistent, and the jury render verdicts of guilty on both, the judge cannot direct a verdict of not guilty on the second and lighter charge, but the jury must further deliberate and decide between the two. But when facts necessary to sustain the verdict on the first count charging the higher offence are consistent with those necessary to sustain the other, even if they do not include them, the defendant suffers no wrong if a verdict of not guilty is directed on the later count after a verdict of guilty on the first.

INDICTMENT in three counts, charging the defendants, Lowrey and Johnson, in the first count, with breaking and entering a building and stealing therein; Lowrey, in the second count, with breaking and entering with intent to commit larceny, Johnson being an accessory before the fact; and Lowrey, in the third count, with stealing, Johnson being accessory before the fact. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict of guilty; and the defendants alleged exceptions. The facts appear in the opinion.

P. J. Casey, for the defendants.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

HOLMES, J. 1. The main question for us is whether there was any evidence of a criminal breaking and entering. The jury were warranted in finding that, in pursuance of a preconcerted scheme, the defendant Johnson, making a pretence of a wish to purchase an article, got the night clerk of the Theodore Metcalf Company to let him into the company's shop at about midnight; that while the night clerk was in the cellar getting the article, Johnson unbolted the door which had been rebolted behind him after his admission, and let in the defendant Lowrey, who concealed himself and remained behind when Johnson left, and afterwards broke open the drawer, etc. The court seems to have required the jury to find that Lowrey opened the door as a condition to their finding him guilty.

It was not necessary that Lowrey should have touched the door if he procured himself to be let in by an accomplice and entered with felonious intent. He might have been convicted, even if the hand which he made use of was innocent, as in case of a servant or constable. *Le Mott's case*, J. Kel. 42. *Farre & Chadwick's case*, J. Kel. 43. *Cassy & Cotter's case*, J. Kel.

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62. *Hawkins's case*, 2 East P. C. 485. *Rolland* v. *Commonwealth*, 82 Penn. St. 306, 323. *Johnston* v. *Commonwealth*, 85 Penn. St. 54, 64. *State* v. *Rowe*, 98 N. C. 629. *State* v. *Johnson*, Phil. (N. C.) 186. *Nicholls* v. *State*, 68 Wis. 416, 421, 422. *Clarke* v. *Commonwealth*, 25 Grat. 908, 913. The accomplice inside the house is guilty of the same offence. *Cornwall's case*, 2 Strange, 881; 1 Hale, P. C. 553; 4 Bl. Com. 227. *Rex* v. *Jordan*, 7 C. & P. 432. *Cooper* v. *State*, 69 Ga. 761. *Ray* v. *State*, 66 Ala. 281, 282. *Breese* v. *State*, 12 Ohio St. 146.

The argument for the defendants assumes that the door was not even latched, and speaks of the defendants as having been invited into the shop. In fact, the door would seem to have been bolted, and if there can be said to be any invitation to enter a closed and bolted shop at midnight, the invitation does not extend to thieves when let in by their accomplices.

2. The jury were instructed, if they found the defendants guilty of breaking and entering on the first count, to find a verdict of not guilty on the third count, which charged Lowrey with larceny in a building, and Johnson with inciting the commission of that offence. They also were instructed to find a verdict for the defendants on the second count. No exception was taken to these instructions. The jury rendered a verdict of guilty on the first count, not guilty on the second, and the foreman, being then inquired of concerning the third count, answered, "Guilty"; whereupon the judge reminded the jury of his former instructions, and directed them to find a verdict for the defendants on the third count, which thereupon they did, and the defendants excepted to the direction.

We see nothing of which the defendants could complain. If the facts necessary to sustain the verdict of guilty on one count were inconsistent with a verdict of guilty on the other, further deliberation would have been necessary in order that the jury might decide between the two, as intimated in *Commonwealth* v. *Haskins*, 128 Mass. 60, 61, 62, and the judge could not have cut the knot by directing a verdict of not guilty upon either. See *Tobin* v. *People*, 104 Ill. 565; *Richards* v. *Commonwealth*, 81 Va. 110. But the facts necessary to sustain the verdict on the first count, charging the higher offence, were all consistent with those charged in the third count, even if not

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necessarily including them. Therefore the defendants suffered no wrong in being acquitted on the third count. See *Commonwealth* v. *Fitchburg Railroad*, 120 Mass. 372, 381; *Commonwealth* v. *Boston & Maine Railroad*, 133 Mass. 383, 391; *Commonwealth* v. *Nichols*, 134 Mass. 531, 536; *Hawker* v. *People*, 75 N. Y. 487.

Exceptions overruled.

LEWIS MAY & another *vs.* CITY OF BOSTON.

Suffolk. November 28, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Land taken for Public Improvement — Damages — Evidence.

Where damages for land taken under a statute for the purposes of a public park are to be estimated as in cases of laying out, altering, or widening highways under the Pub. Sts. c. 51, § 8, which provides that the damages shall be fixed at the value of the land before such laying out, alteration, or widening, the owner is to be compensated by the payment of the fair value at the time of the taking. It is the purpose of the Legislature not to permit owners to recover damages at a value enhanced by a public improvement which owes its existence to the change of use of the very land to be paid for.

On a petition for a jury to assess damages for the taking of land under a statute for the purposes of a public park, evidence of a printed report of the park commissioners containing a recommendation of their advisory landscape architect ten years previously is too remote to show that the project for a park had taken definite form previous to the time in question, such that the enhanced value of land in the vicinity was founded on a settled plan which did not include the petitioners' land, and which had ceased to have indefinite features, under which their land was liable to be taken and paid for at a value unaffected by the project.

On a petition for a jury to assess damages for the taking of land by a city under a statute for a public park, it appeared that the petitioners conveyed to the city six years previously land adjoining that in question "for the purposes of a public park," the deed providing that "a strip not less than sixty-five feet wide adjoining the remaining land of grantors, and in length extending the whole distance where said granted premises bound on the remaining land of grantors, to wit, for a distance of $595\frac{10}{100}$ feet shall forever be and remain a public way." *Held*, that the words "for the purposes of a public park" constituted a restriction enforceable in equity, and that, if the jury believed that the value of the land taken from the petitioners was enhanced in value at and prior to the taking, by reason of its abutting upon land so held by the city under the previous deed, they might include such enhancement in their estimate of damages. *Held, also*, that the provision in regard to the way sixty-five feet wide was a condition, a breach of which would work a forfeiture, and not a restriction enforceable in equity.

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On a petition for a jury to assess damages for the taking of land by a city under a statute for a public park, the judge declined to instruct the jury that, if they believed that the land had at and prior to the time of taking been increased in value by reason of the contemplated laying out of a park way which was to include land conveyed by the petitioners to the city six years previously, but not the land for the taking of which the petitioners claimed damages, the jury might include such increase in value. *Held*, that the request would have been correct as applied to a case in which it appeared that there was a definite and settled plan for laying out a defined park which did not include the land taken from the petitioners, and that the taking of the petitioners' land was for a new and different public improvement.

On a petition for a jury to assess damages for the taking of land by a city under a statute for a public park, the judge declined to instruct the jury, as requested by the petitioners, that, if the jury believed that the land had at and prior to the time of taking been increased in value by reason of the likelihood that a public park was to be constructed adjoining, but not including, the land taken, they might include such increase in value in their estimate, and that, if they believed that the land had at and prior to the time of the taking been increased in value by reason of the likelihood that a parcel of land adjoining that in question conveyed six years previously by the petitioners to the city for the purposes of a public park was to constitute a portion of a more extended parkway or system of parks, they might include such increase in value in their estimate. *Held*, that the requests were rightly refused, because the "likelihood that a public park was to be constructed adjoining, but not including," the land taken from the petitioners, did not exclude the possibility that, when the scheme was carried out by locating the park on the land, it would include this land, in which case it would be paid for at its value without increase from the improvement.

On a petition for a jury to assess damages for the taking of land, in April, 1890, by a city under a statute for a public park, the petitioners called a witness, who testified as an expert to the value of the petitioners' land, and further testified that a land company of which he was treasurer had sold, in November, 1891, through him, land directly opposite that of the petitioners, and was asked at what price the sale was made. The judge excluded the testimony. *Held*, that the exclusion was within the discretion of the judge. *Held*, *also*, that it did not appear that the land inquired about was situated similarly to that of the petitioners, and that its value might have been greatly changed by the location of the park, or by other causes, in the interval between April, 1890, and November, 1891.

PETITION for a jury to assess the damages for the taking, on April 30, 1890, of land of the petitioners under the St. of 1875, c. 185, by the Board of Park Commissioners of the city of Boston, for the purposes of a public park.

At the trial in the Superior Court, before *Hammond*, J., the petitioners introduced in evidence a deed from them to the city of Boston, dated December 23, 1884, and recorded on January 1, 1885, whereby the petitioners conveyed to the city of Boston, in fee, "for the purposes of a public park," a parcel of land containing 123,560 square feet, which deed contained the following

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clause: "Provided, however, and these presents are upon the condition, that a part of the granted premises, to wit, a strip not less than sixty-five feet wide adjoining the remaining land of grantors, and in length extending the whole distance where said granted premises bound on the remaining land of grantors, to wit, for a distance of $595\frac{70}{100}$ feet, shall forever be and remain a public way." There was no evidence in the case that a public way was ever laid out by the street commissioners on the 123,560 feet bought of the petitioners in 1884, and there was evidence tending to show that there were no houses very near this land, and the view of the premises showed that no way of any kind had been constructed on the lot of 123,560 feet.

It also appeared in evidence, that, prior to April 30, 1890, the town of Brookline conveyed to the city of Boston for park purposes about 800,000 square feet of land adjoining the parcel so conveyed by the petitioners to the city of Boston, as above stated.

The parcel of land taken from the petitioners on April 30, 1890, contained 149,500 square feet, adjoined the parcel conveyed on December 23, 1884, by the petitioners to the city, and was a part of a larger parcel belonging to the petitioners containing 631,175 square feet, extending from Day Street in that part of Boston known as Jamaica Plain to the parcel conveyed on December 23, 1884, by the petitioners to the city.

The petitioners offered evidence tending to show that the project of laying out a parkway extending from the Back Bay Fens, so called, to Jamaica Pond, had been in contemplation for a great many years, and as far back as the year 1880, and had been made public in the annual published reports of the board, and offered in evidence the printed report of the board for the year 1880, containing a report and recommendation to the board of Frederick Law Olmsted, the landscape architect advisory to the board, embodying a plan or map of such proposed parkway, as tending to show, in connection with said deed of December 23, 1884, from the petitioners to the city, a contemplated parkway, not to include the land taken from the petitioners on April 30, 1890; but the judge excluded the evidence.

The petitioners further offered evidence tending to show that the contemplated laying out of a parkway, and the knowledge of

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the same on the part of the public through the published reports of the board, and the deed from the petitioners to the city of December 23, 1884, caused an enhancement of the value of the remaining land of the petitioners, including that taken on April 30, 1890.

The petitioners called as a witness Alfred D. Chandler, Esq., who testified as an expert to the value of the petitioners' land, and further testified that the Brookline Land Company, of which the witness was treasurer, had sold in November, 1891, through the witness, a parcel of land containing about one hundred thousand square feet on Pond Avenue, and directly opposite the land of the petitioners, and was asked by the petitioners at what price said sale was made; but the court excluded the evidence.

The petitioners contended that the land taken from them on April 30, 1890, would have been, prior to that time, greatly increased in value if the strip of land sixty-five feet wide extending along the boundary of the same, and mentioned in the deed of December 23, 1884, was to be a public way, and some of the experts who testified for the petitioners gave, as one of the reasons for the opinion they gave of the value of the land of the petitioners taken, that it bounded on a strip of land sixty-five feet wide which was or was to be a public way.

The petitioners requested the judge to instruct the jury as follows:

"First. The words 'for the purposes of a public park,' in the deed of Dec. 23, 1884, from the petitioners to the city of Boston, constituted a restriction enforceable in equity; and if the jury believe that the value of the land taken from the petitioners was enhanced in value at and prior to the time of such taking by reason of its abutting upon a public park, the jury may include such enhancement of value in their estimate of damages.

"Second. By the acceptance on the part of the city of Boston of the deed to it from the petitioners of Dec. 23, 1884, the city of Boston agreed and was bound to permit the parcel of land thereby conveyed to be used solely for the purposes of a public park, and if the jury believe that the land taken from the petitioners had been increased in value at and prior to the time of the taking by reason of said agreement and obligation on the part of the city, the jury may include such increase in their estimate of damages.

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"Third. The conveyance of Dec. 23, 1884, by the petitioners to the city of Boston, of the parcel of land containing about 123,560 square feet, and the acceptance by the city of said conveyance, constituted a dedication of said parcel of land to public uses for the purposes of a public park, and the jury in estimating the petitioners' damages may consider any enhancement of value by reason of such dedication.

"Fourth. If the jury believe that the land taken from the petitioners on April 30, 1890, had at and prior to that time been increased in value by reason of the contemplated laying out of a parkway which was to include the land conveyed by the petitioners to the city of Boston on Dec. 23, 1884, but not the land for the taking of which the petitioners claim damages, the jury may include such increase in their estimate of damages.

"Fifth. If the jury believe that the land taken from the petitioners on April 30, 1890, had at and prior to that time been increased in value by reason of the likelihood that a public park was to be constructed adjoining, but not including, said land so taken from the petitioners, the jury may include such increase in value in their estimate of damages.

"Sixth. If the jury believe that the land taken from the petitioners on April 30, 1890, had at and prior to that time been increased in value by reason of the likelihood that the parcel of land conveyed on Dec. 23, 1884, by the petitioners to the city of Boston for the purposes of a public park was to constitute a portion of a more extended parkway or system of parks, they may include such increase in value in their estimate of damages.

"Seventh. The provision in the deed of Dec. 23, 1884, from the petitioners to the city of Boston, that a strip of land not less than sixty-five feet wide adjoining the remaining land of the grantors should forever be and remain a public way, although in form a condition, constituted a restriction enforceable in equity; and if the jury believe that the land taken from the petitioners was increased in value at and prior to the time of such taking by reason of its abutting upon a public way, they may include such enhancement of value in their estimate of damages.

"Eighth. By the acceptance on the part of the city of Boston of the deed to it from the petitioners of Dec. 23, 1884, the

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The court gave requests numbered 1, 2, 3, and 12, declined to give requests numbered 7, 8, 9, and 11, and in place of the remaining requests, among other things, instructed the jury as follows:

"This strip of land was a part of the land owned by the petitioners, and the whole land ran to Day Street, and the petitioners had a right of access to it over Day Street, and over the remaining land to the land taken. They had no other right of access to it. . . . On the west of it is a piece of land which, in 1884, was deeded to the city of Boston; and it is claimed by both parties that the language of that deed is such as to make it an important question for you in considering the value of this land. That is a deed by these petitioners to the city of Boston of a tract containing about one hundred and twenty-three thousand feet. It purports to be a deed to the city of that land for park purposes. And I instruct you that the words 'for the purposes of a public park,' in this deed, constituted a restriction enforceable in equity as to that provision; and if the jury believe that the value of the land taken from the petitioners was enhanced in value at and prior to the time of such taking, by reason of its abutting upon land so held by the city of Boston, they may include such enhancement in their estimate of damages. That is to say, the land was taken by the city of Boston to be used for park purposes, and the city had no right to use it for any other purpose; and if it attempted to use it for any other purpose, the owner of this land which is actually taken could prevent the city from using it for any other purpose, except so far as the city undertook to use it for the purpose of a public way. . . .

"The deed is upon the condition that there shall be a public way sixty-five feet wide running the whole length of the line, and adjoining the land which is actually taken here. You are not to assume there is a public way there. You are not to assume that, even if there is a public way, there is any obligation on the part of the city of Boston to carry it any farther, even north or south, than the line upon which the public way is spoken of in the deed. The deed is upon condition that there shall be a public way sixty-five feet wide adjoining the land which was taken in 1890. But the city did not lay out the public way. It was not obliged by that deed to lay it out

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city of Boston agreed and was bound to permit a strip of land sixty-five feet wide, extending along the boundary of the land, for the taking of which the petitioners claim damages, to forever be and remain a public way; and if said land so taken from the petitioners had been enhanced in value at and prior to the time of such taking, by reason of said agreement and obligation on the part of the city, the jury may include such enhancement of value in their estimate of damages.

"Ninth. The conveyance on Dec. 23, 1884, by the petitioners to the city of Boston, and the acceptance by the city of said conveyance, constituted a dedication to public uses for the purposes of a public way of a strip of land sixty-five feet wide, extending along the boundary of the land taken from the petitioners, and the jury in estimating the petitioners' damages may consider any enhancement of value by reason of such dedication.

"Tenth. If the jury believe, upon all the evidence, including the deed of Dec. 23, 1884, from the petitioners to the city of Boston, that on and prior to April 30, 1890, there was a likelihood that a public way sixty-five feet wide would be laid out along the boundary of the land for the taking of which the petitioners claim damages, the jury may include in their estimate of damages the increase (if any) in the value of said land so taken by reason of such likelihood.

"Eleventh. If the jury believe that prior to April 30, 1890, this park project was talked of, and printed reports and plans were in circulation showing a plan of a public park, and that it was known that about eight hundred thousand feet of land had been sold by the Brookline Land Company adjacent to the land of the petitioners to the city for park purposes, — if these facts, together with others, increased the market value of this land, the jury may consider these facts in estimating damages.

"Twelfth. Under the statute by virtue of which the petitioners' land was taken, the remainder of the petitioners' land is subject to assessment for betterments; and if the jury believe that said remainder of the petitioners' land was benefited by reason of the laying out of the parkway in question, they are not to consider such benefit in estimating the petitioners' damage by reason of the taking."

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The court gave requests numbered 1, 2, 3, and 12, declined to give requests numbered 7, 8, 9, and 11, and in place of the remaining requests, among other things, instructed the jury as follows:

"This strip of land was a part of the land owned by the petitioners, and the whole land ran to Day Street, and the petitioners had a right of access to it over Day Street, and over the remaining land to the land taken. They had no other right of access to it. . . . On the west of it is a piece of land which, in 1884, was deeded to the city of Boston; and it is claimed by both parties that the language of that deed is such as to make it an important question for you in considering the value of this land. That is a deed by these petitioners to the city of Boston of a tract containing about one hundred and twenty-three thousand feet. It purports to be a deed to the city of that land for park purposes. And I instruct you that the words 'for the purposes of a public park,' in this deed, constituted a restriction enforceable in equity as to that provision; and if the jury believe that the value of the land taken from the petitioners was enhanced in value at and prior to the time of such taking, by reason of its abutting upon land so held by the city of Boston, they may include such enhancement in their estimate of damages. That is to say, the land was taken by the city of Boston to be used for park purposes, and the city had no right to use it for any other purpose; and if it attempted to use it for any other purpose, the owner of this land which is actually taken could prevent the city from using it for any other purpose, except so far as the city undertook to use it for the purpose of a public way. . . .

"The deed is upon the condition that there shall be a public way sixty-five feet wide running the whole length of the line, and adjoining the land which is actually taken here. You are not to assume there is a public way there. You are not to assume that, even if there is a public way, there is any obligation on the part of the city of Boston to carry it any farther, even north or south, than the line upon which the public way is spoken of in the deed. The deed is upon condition that there shall be a public way sixty-five feet wide adjoining the land which was taken in 1890. But the city did not lay out the public way. It was not obliged by that deed to lay it out. It

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had taken the deed, and, if it did not lay out the public way, it would forfeit the land which it took. So, although the city was not under any obligation to create a public way there, still, as it took the deed upon condition that it should, it would violate the condition if it did not. And, therefore, there was that inducement or reason on the part of the city to build the public way. . . And yet the city did hold that land liable to be forfeited unless it used it for that public way; and you may take that into consideration on the question of how far that would affect the market value of the land that was taken.

"There is one modification which is to be stated with reference to the market value. If the market value of this land taken had, prior to the taking, been raised by the belief on the part of the public that there was eventually to be a public park laid out in this vicinity, and if you find that the lands generally in this vicinity, this land among them, had increased in market value by reason of the belief on the part of the public that there was to be a public park in this vicinity, you cannot take that into consideration on the question of the market value, if the plan thus discussed and supposed by the public to exist did finally, as carried out, take this very land. . . . That rule, however, I instruct you, will not apply to this land so far as it is affected by this piece of land upon the west, which was deeded to the city in 1884. If you are satisfied that, by the purchase of this piece of land for the purposes of a public park, the market value of the land finally taken, six years afterwards, was increased, so that in April, 1890, this land taken at that time was worth more than it was before the deed, or by reason of the deed of 1884, the benefit to the land by reason of that deed, and laying out of that parcel deeded in 1884, may fairly be taken by you into consideration."

The jury returned a verdict for the petitioners in excess of the sum awarded them by the Park Commissioners, but less than that claimed by them at the trial, and the petitioners alleged exceptions.

T. J. Gargan & B. L. M. Tower, for the petitioners.

T. M. Babson, for the respondent.

KNOWLTON, J. The question principally discussed in this case is how to apply the rule for the estimation of damages for

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land taken for a public improvement, when the improvement has been long contemplated, and the expectation of it has increased the market value of the land in the vicinity.

An owner of land taken by right of eminent domain is to be compensated by the payment of the fair value of it at the time of the taking. Ordinarily the price at which such land will sell in the market, if there is a market for it, is the criterion by which to make the estimate. But in certain cases the market price is not the true standard by which to determine the value. By the Pub. Sts. c. 51, § 3, it is provided that in laying out, altering, or widening highways, "the damages for land taken shall be fixed at the value thereof before such laying out, alteration, or widening." In the present case the damages are to be estimated as in cases of laying out, altering, or widening highways. St. 1875, c. 185, § 5.

It was evidently the purpose of the Legislature not to permit landowners to recover damages for the land taken for a public use at a value enhanced by a public improvement which owes its existence to the change of use of the very land which is to be paid for. Land taken is to be paid for at its value. Its value is to be determined by a consideration of the uses to which it is adapted. Its market value cannot legitimately be founded on anything else. It may have a market value largely dependent on a probable future demand for it; but that which is relied on ultimately to create the demand is the valuable uses to which it can be put. Whenever there is an expectation of a public improvement, the market price of land in the vicinity is likely to advance, in anticipation of the more valuable uses to which the land can be put when the improvement is made. Its real value for use is not increased until the change in its surroundings comes. If the expected improvement involves the taking of land by the right of eminent domain, the value of the land taken will never be enhanced by the improvement, for the taking precludes the possibility of ever using it under improved conditions. In that respect it stands differently from other land in the vicinity which is not taken. Whenever there is a project for laying out or widening a way, or taking land for any other public use which is expected to increase the value of real estate in the neighborhood, if the market price of land in

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the vicinity rises in anticipation of the change, the statute very justly says that the land taken shall not be paid for at the increased price. If it is known from the beginning exactly what land will be taken, it must also be known that that particular land can never be made more valuable by the improvements, since it can never be used by its owner under the improved conditions. If the plan is general, and it is not known exactly what land will be needed by the public, but only that some land will, whenever the plan takes definite form, and the location is fixed, it is known that the land to be taken has not received, and never can receive, any benefit from the improvements. There is no injustice in saying that such land shall not entitle its owner to be paid out of the public treasury at a rate determined, not by its value for use, but by a prospective and speculative value of land in the vicinity, derived from an expectation of the benefit to come from the public use for which this is to be taken. One holding or buying or selling land in a neighborhood where the market price has risen in anticipation of the public improvements which will involve the taking of a part of it for a public use, is bound to know that under the statute the land which will be taken for such a use can be paid for only at its value, unaffected by the improvements. *Benton* v. *Brookline*, 151 Mass. 250. The constitutionality of legislation of this kind was established in *Dorgan* v. *Boston*, 12 Allen, 223, 231.

The land of the petitioners was taken for a public park. There was evidence tending to show that the contemplated laying out of a park in this neighborhood, and general knowledge that a park was likely to be laid out, enhanced the value of the remaining land of the petitioners, including that taken on April 30, 1890.

The evidence of a printed report of the park commissioners, containing a recommendation of their advisory landscape architect, was rightly excluded. The recommendation to the board made in 1880 was too remote to be admitted as evidence that the project for a park had taken definite form previous to 1890, such that the enhanced value of land in the vicinity was founded on a settled plan which did not include the petitioner's land, and which had ceased to have indefinite features, under which their land was liable to be taken and paid for at a value

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unaffected by the project. It was not competent for the petitioners to show that the land in the vicinity had increased in price by reason of the general expectation that a park would be laid out there, for the purpose of enhancing their damages.

We discover no error in the refusal of the presiding justice to give the instructions requested, or in the instructions given. The fourth request for instructions would have been correct, as applied to a case in which it appeared that there was a definite and settled plan for laying out a defined park which did not include the land taken from the petitioners, and that the taking of the petitioners' land was for a new and different public improvement. By the evidence, so far as it is reported in this case, the whole proceedings related to a single improvement, which had not been carried out, and the details of which had not been settled before the petitioners' land was taken. We do not find in the bill of exceptions any evidence that the increase in value of the land prior to the taking was founded on a contemplated laying out of a park whose lines were fixed, so that changes could not reasonably be anticipated as possible, and we are of opinion that the jury could not have found, on any evidence disclosed in the bill of exceptions, that the increase referred to was on account of any other plan than the general originally indefinite plan under which the petitioners' land was finally taken.

The fifth and sixth requests for instructions were rightly refused, because the "likelihood that a public park was to be constructed adjoining, but not including," the land taken from the petitioners, did not exclude the possibility, that when the scheme was carried out by locating the park on the land, it would include this land, in which case it would be paid for at its value without increase from the improvement. The instructions given upon the principal questions in the case were in accordance with the views we have expressed. The presiding justice was also right in ruling that the provision in regard to the way sixty-five feet wide on the land previously conveyed by the petitioners was a condition a breach of which would work a forfeiture, and not a restriction enforceable in equity.

It was within the discretion of the court to exclude the testimony of the witness Chandler. It does not appear that the

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land inquired about was situated similarly to that of the petitioners; besides, its value might have been greatly changed by the location of the park, or by other causes, in the interval between April, 1890, and November, 1891.

Exceptions overruled.

BOLLING G. ABERCROMBIE *vs.* CHARLES E. SPALDING & another.

Suffolk. November 29, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Advances by a Partner to his Firm — Covenant to pay Firm's Debts — Liability of Guarantor.

A. covenanted with his partner B. to compromise and settle all the debts of the firm as shown on an annexed exhibit or on the books of the firm, and B. released to A. all his interest in the assets. The agreement was made in contemplation of a possible settlement of the partnership affairs in insolvency, in which event the agreement was to be void. The agreement was of the same date as a stipulation of C., a third party, guaranteeing to B. the performance by A. of his covenant. The agreement and stipulation were apparently on the same paper, and both contracts were presumably part of a single transaction. C. was the principal creditor of the firm, and had no other inducement to execute the guaranty than the fact that he was a creditor. B. advanced to the firm, at different times, certain amounts entered on the books, some of which were entered with the word "loan" written on the same line. B. had of the firm cash and clothing to a certain amount, as appeared on the books, except that the prices for clothing were not carried out. B. accepted and relied upon the guarantee of C. as contained in the exhibit, and demanded both of A. and C. the sum claimed by him to be due thereunder. This sum did not appear on the exhibit, and was larger than the sum claimed by C. At the time of executing the agreement, B., on demand, divided with A. a sum which B. had collected of customers of the firm. *Held*, that C. was not liable under the guaranty for the advances by B. to the partnership.

CONTRACT upon a written guaranty. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, on agreed facts, in substance as follows.

William B. Phinney and Bolling G. Abercrombie, partners, entered into an agreement, dated August 28, 1889, wherein they stipulated:

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"That the said firm is dissolved by mutual consent. That the said Phinney shall wind up the affairs of said firm, and the said Abercrombie, in consideration of the agreement of the said Phinney herein contained, hereby grants, bargains, sells, and assigns to the said Phinney all his right, title, and interest in and to the assets of every name and nature of said firm of Phinney and Abercrombie, including all bills and accounts receivable of said firm now outstanding.

"And the said Phinney hereby agrees that he will adjust, compromise, and settle all the debts and liabilities of said firm of Phinney and Abercrombie shown on 'Exhibit A' hereto annexed, or on the books of said firm; also any and all other debts owing by said firm of Phinney and Abercrombie which have been contracted by the said Phinney, if there are any such debts, unless, through the failure of any of the creditors of said firm to accept the composition offered, it shall be deemed expedient to adjust the affairs of said firm in insolvency, within sixty days from the date hereof, then this agreement, as well as all other agreements and guaranties connected herewith, shall be null and void.

"And the said Phinney and Abercrombie do hereby respectively release each other from all claims of whatsoever name and nature either may have against the other, except the agreements contained in this instrument.

"And the said Abercrombie hereby agrees that he knows of no other indebtedness of said firm except such as appears on the books of said firm, or on the 'Schedule A' hereto annexed."

Exhibit A consisted of the names of sixteen creditors, and after the name of each creditor was written the amount due him. Then came the following guaranty:

"We, the undersigned, in consideration of the agreements entered into by the said Abercrombie in the foregoing agreement, and of the payment of one dollar, the receipt of which is hereby acknowledged, do hereby guarantee to the said Abercrombie the performance by the said Phinney of all the agreements and undertakings entered into by the said Phinney in the foregoing instrument.

"Witness our hands and seals this twenty-eighth day of August, A. D. 1889. Spalding, Elms, & Co. [Seal]."

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The name of Spalding, Elms, & Co. was the first name in "Exhibit A," and they were the largest creditors on the list, their claim being $458.33.

The affairs of the firm were not settled in insolvency. The plaintiff advanced to the firm, at different times, the sum of $759.96, as appeared upon the books, all of which was used in the firm's business, of which sum the sums of $250 advanced March 17, 1888, $200 advanced August 20, 1888, $50 advanced March 21, 1889, $50 advanced April 6, 1889, and $50 advanced July 6, 1889, were entered upon the books with the word "loan" written on the same line with the amounts. The plaintiff had of the firm cash and clothing to the amount of $520.86, of which amount $253.43 was in cash and $267.43 was in clothing, as appeared upon the books. The prices for the clothing were not carried out on the books, but at a fair price amounted to the said sum of $267.43. All the above items of credit and debit appeared on the account of B. G. Abercrombie on the ledger of the firm, but the prices for clothing were not carried out on the books at the date of "Exhibit A." The first item, of $250, advanced March 17, 1888, opposite which was written the word "loan," was money contributed by Abercrombie to the business at the commencement of the partnership, in accordance with his agreement with Phinney. The sum of $250 which appeared on Phinney's account was raised on a note which was paid by the firm money, and he afterwards contributed in cash the sum of $109.11, being all his contribution of capital to the firm, and he drew out from the firm the sum of $390.70.

The plaintiff accepted and relied upon the guaranty of the defendants as contained in "Exhibit A," and he demanded both of Phinney and the defendants the sum claimed by him to be due thereunder. At the time of the execution of "Exhibit A," Phinney demanded of Abercrombie $85, collected by the latter of customers of the firm. The matter was adjusted by Abercrombie then paying over to Phinney the sum of $42.50.

T. E. Grover & F. Joy, for the plaintiff.

W. A. Knowlton, for the defendants.

HOLMES, J. There is no doubt that advances by a partner to his firm, other than contributions of capital, are accounted for

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by the firm on the footing of debts, although postponed of course to the claims of other creditors. *Miller's River National Bank* v. *Jefferson*, 138 Mass. 111, 112. Lindl. Part. (5th ed.) 402. See *Whitcomb* v. *Converse*, 119 Mass. 38, 43. There is no doubt that such liabilities of the firm often are described as debts in commercial language, or that, in construing a commercial agreement, the question is what the words fairly mean, not whether they are used with strict legal propriety. We assume that an agreement by a continuing with a retiring partner to pay all the debts of the firm might appear from the context and the circumstances to apply to a debt in the general commercial sense due from the firm to the retiring partner, as was held in *Hobart* v. *Howard*, 9 Mass. 304. We assume that the same might be true even where, as here, the retiring partner surrenders all his interest in the assets, and that under some circumstances such a conveyance might be interpreted to mean a conveyance of his interest only in what would be divided as capital in a strict sense. *Hamer* v. *Giles*, 11 Ch. D. 942. *Austin* v. *Jackson*, 11 Ch. D. 942, n. Lindl. Part. (5th ed.) 320.

In the case at bar, in favor of the plaintiff's contention, there is the fact that the partner's covenant refers to "all the debts and liabilities" of the firm shown on the annexed exhibit, "or on the books of the firm." On the other hand, this agreement was of the same date as the guaranty in suit, seemingly on the same paper, and presumably both contracts were parts of a single transaction. The defendants were the principal creditors of the firm. At the same time they were entitled to a less sum than that claimed by the plaintiff as due to him. It does not appear that they had any other inducement to execute the guaranty than the fact that they were creditors, so that it is highly improbable that they or the plaintiff supposed that they were guaranteeing a debt which would be postponed to their own. The plaintiff's claim was not shown on the exhibit. The language of the partner's covenant was that he would "adjust, compromise, and settle" the debts referred to, — words obviously chosen with reference to other creditors than the covenantee. The agreement was made in contemplation of a possible settlement of the partnership affairs in insolvency, in which event the agreement was to be void. This fact alone

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makes the plaintiff's construction improbable. The plaintiff releases to his partner all his interest in the assets. *Lesure* v. *Norris*, 11 Cush. 328, 330. Finally, at the time of executing the document, the plaintiff, on demand, divided a sum which he had collected of customers, — conduct not to be expected if he then was understood to have an outstanding claim. Dealing only with the particular instrument before us, we are of opinion that the defendants are not liable. See *Lambert* v. *Griffith*, 50 Mich. 286; *Patterson* v. *Martin*, 6 Ired. 111; 2 Bates Part. § 629. *Judgment for defendants.*

BRIDGET MAHER *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. November 29, 30, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Employers' Liability Act — Railroad — Loss of Life — Due Care — Instantaneous Death — Negligence.

In an action against a railroad corporation, under the St. of 1887, c. 270, for causing the death of a brakeman in its employ, who was a skilful man and was apparently killed by reason of his head coming in contact with a bridge, no one having seen the accident, evidence that his duty required him to be on the rear car of a freight train, which on this occasion was a tall refrigerator car attached to the rear end of the caboose, and to watch the rear end of the train, riding on the top of the car with his face to the rear, although he knew there were low bridges under which the car must pass, warning of the approach to which was expected to be given by tell-tales, one of which, guarding the approach to the bridge in question, was out of order, will justify the inference that he was in the exercise of due care.

In an action against a railroad corporation, under the St of 1887, c. 270, for causing the death of a brakeman in its employ, who, no one having seen the accident, was apparently killed by reason of his head coming in contact with a bridge while riding on the top of a tall refrigerator car attached to the rear end of the caboose of a freight train, the facts that the speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death, that the men in the caboose, although very near him, heard no outcry, and that the defendant's workmen upon another train, who picked up the dead body, were not called as witnesses, justify the inference that he died instantly, or without conscious suffering.

In an action against a railroad corporation, under the St. of 1887, c. 270, for caus-

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ing the death of a brakeman in its employ, who, no one having seen the accident, was apparently killed by reason of his head coming in contact with a bridge, while riding on the top of a tall refrigerator car attached to the rear end of the caboose of a freight train, the declaration alleged negligence in running the car under the bridge, and also in improperly guarding the approach to the bridge. At the trial, there was evidence that this was not a customary arrangement of the train, the caboose usually being at the rear end; that the speed of the train was about twenty miles an hour, which was also unusual; and that the tell-tale guarding the approach to the bridge was out of order. The defendant asked the judge to rule that the jury could not find for the plaintiff, on the ground that the defendant negligently ran the car under the bridge. The judge refused so to rule, and, while in his charge the contention that the car was run carelessly was adverted to, the jury were instructed that, in order to find for the plaintiff, they must be satisfied that the defendant was negligent in not having the tell-tales, and that their absence was the cause of the accident. *Held*, that the defendant had no ground of exception.

TORT, under the St. of 1887, c. 270. The material part of the declaration was as follows: "And the plaintiff says that she is the mother and next of kin of Peter W. Maher; that on or about February 4, 1891, the said Peter W. Maher, now deceased, was employed by the defendant corporation; that while he was so employed, and in the exercise of due care, the defendant so negligently and carelessly ran a car, upon which he was required in the course of his employment to be, under a bridge, and so negligently and carelessly protected him in properly guarding the approach to said bridge, thereby not notifying him of his approaching the same, that he, the said deceased, was knocked off from the said car and killed." Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff gave to the defendant the notice required by the statute of the time, place, and cause of the injury within thirty days thereafter, and the same was put in evidence.

The plaintiff testified that she lived in Binghamton, New York, and had lived there for the last five years; that Peter W. Maher was her son, and had lived there with her, following the business of railroading; that her daughter Hannah had also lived with her during that time; that her other children were married and lived elsewhere, and her son took care of her, and saw that she wanted for nothing; that he was not away until he came to Boston, which was four or five weeks before he was killed; that he provided the house and furnished all that she

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needed; that she had no other means of support except working for her living since he lived with her; and that he had sent her some money a week before he was killed.

Hannah Maher testified that she was a sister of Peter W. Maher, and lived with him and her mother at Binghamton; that her brother provided the board; that she was twenty-one years old when he died; and that she was a tailoress, and worked as such, and contributed what she could of her wages to the support of her mother, but that she could do very little.

Edwin White testified that he was a locomotive fireman on the New York and New England Railroad, and knew Peter W. Maher at Binghamton; that Maher was a conductor in the Erie Railway yard at Binghamton, and spare conductor and switchman; that he was a skilful, able man in his business; that he met him on the way from Binghamton, and came with him to Boston, and they got employment on the defendant's railroad about January 17, 1891; that Maher was killed on February 4, 1891; that he was then the rear brakeman on a freight train; that the witness did not work on the same train with him, Maher working days, while he worked nights; that he went to the morgue and examined Maher's body after the accident; that he found a blow over his eye, a large scar, and the back of his head badly bruised; that his skull was broken in at the back; that it looked as if it might have been hit with a sharp edge; that the next morning he was coming from Worcester, and his train stopped under the Back Bay Park bridge in Boston, and he examined the bridge and found flesh and hair on the stringer of the bridge, which was an iron beam with a flange on the lower side standing out four or five inches, with a rough edge right over the car as it passes under, and on the bridge he found that part of the smoke which covered the paint on the edge of the stringer was knocked off, and he also saw that some of the wires of the tell-tale were gone; that these wires were about three feet long, connected with a small piece of wood about five feet long, and dangled down so as to hit a man in case he was going under the bridge; that he knew what kind of a car Maher was on at the time he was killed, and had measured the same build of cars; that he knew which car Maher was on because he saw the car that morning when he was on it;

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that he was getting on his car then, and had hold of the brake wheel; that that car was the same size as the one he measured, which was twelve and a half feet high; that he measured the distance from the place where he saw marks of flesh and hair to the rail, and it was about fourteen and a half feet; that the brake was about eight inches above the top of the car; that the only way to set these brakes on a car was to put one foot against the dog and bend over, but a man might get down on one knee.

On cross-examination, he testified that he looked the bridge over on February 5, but made the measurements some time, perhaps two months, afterwards; that there were a good many of these refrigerator cars in use which are twelve feet and six inches high; that they are cars which bring provisions from the West, and in his business he was familiar with using them; that the stringer of the bridge on which he saw the marks was the first one toward the east, and it was about even with the abutment of the bridge, but the bridge overhangs the stringer probably two feet; that the tell-tale was about one hundred feet east of the bridge; that the wires of the tell-tale sometimes get broken off, and he had seen them thrown up over the bar, but had never known a brakeman to throw them up; that the point where the Boston and Albany Railroad crosses the Providence division of the Old Colony Railroad is east of the place where Maher was injured; that in going from that crossing toward the west the first overhead bridge that one passes under is the Huntington Avenue bridge, that the next one is the Boylston Street bridge, that the next one is a tower bridge, West Chester Park bridge, and the next bridge the Back Bay Park bridge, where Maher was injured; that in the morning of February 5 he saw blood on the sleepers of number one track under the bridge, near the centre of the bridge; and that there had been a tell-tale there, and the bar of the tell-tale and some of the wires were still there, but a part of the wires were gone.

Charles W. Hibbard testified that he was a police officer on the Back Bay, and that the bridge in question came on his beat, and he was familiar with it; that Maher was killed on February 4, as he knew, because his attention was called to it by a man on the defendant's track; that he then went to the bridge and found twelve of the tell-tales gone from number one track; that

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he had noticed the absence of those wires previously to that, perhaps a week or so; and that he did not examine the place under the bridge, but reported to his sergeant, and he went down and brought up some blood and laid it on the sidewalk. On cross-examination, he testified that, when he said that twelve tell-tales were gone, he meant that twelve brass wires which hung over the bar were gone; and that this tell-tale was about ninety or a hundred feet from the bridge.

Hector Scott testified that he was a freight brakeman on the Boston and Lowell railroad; that, at the time of the injury to Maher, he was at work on the defendant's railroad as hind middle-man on the train with Maher; that Maher was the tail-man, and his position was on the rear car; that he was killed about eight o'clock in the morning of February 4, 1891; that they left Boston with the car, caboose, and engine gang; that the gang was composed of the engineer, fireman, conductor, and four brakemen; that they picked up a car at the Back Bay, a Swift's refrigerator car, which was one of the high cars, and started for Brighton; that this car was taken in the rear, behind the caboose; that this was not customary; that he had not known it to be done before; that he had been in that gang from January 17; that from that time until the morning of the accident, he did not remember that the train had ever been made up in that way; that the brake on the caboose was down on the platform; that he thought the train was going eighteen or twenty miles an hour that morning; that he could not say if that was an unusual rate of speed; that he was in the caboose, and the first he knew of the accident was when they got to Cottage Farm and missed Maher; that they then went back and found that a passenger train had picked him up, just ahead of them; that the train was on number one track when he was killed; that he examined the track and found blood there; that he found twenty to thirty inches' space of the tell-tale gone over the middle of the track; that that was about where his brake was; and that he could not say what the action of the smoke was that morning. On cross-examination, he testified that, when he said that the tell-tale was gone for twenty or thirty inches, he meant that that width of the wires was gone, but that some of the wires were there; that the blood marks

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were on number one track, about ten feet west from the east side of the bridge; that the brake-handle was usually on top of the car on freight cars, very few being at the end; that in making up a train, the caboose was not always the farthest from the engine, and sometimes was not there at all; and that he had observed the tell-tale at the bridge two or three days before the accident, and there were a number of wires from the tell-tale missing.

John Evans testified that he was freight brakeman on the Boston and Lowell Railroad, and was on the train with Maher the day he was killed; that he was in the caboose at the time he was killed; that Maher was the rear-man, and his position was to take care of the rear end of the train; that it was necessary that the rear brakeman should always be in his position; that the train was going at an unusual rate of speed when he was killed; that he could not say anything as to the smoke of the engine on that morning, it acting differently on different days and in different weather; that the train was made up differently that day, as they had a car that was put on at the rear end of the train; that the caboose was usually the rear end of the train; that he did not know why this car was on the end instead of the caboose, it was simply a matter of convenience; and that the train was under the control of the conductor. On cross-examination, he testified that, when Maher went out of the caboose, he heard him told to get on the top with the flag, ready to flag the rear end.

Charles F. Allen testified that his business was railroading; that he was working on the Old Colony Railroad when Maher was killed; that on the next morning he rode in with White, and saw that some wires were gone on the tell-tale, and there was blood on the bridge and blood on the ground; and that this was over the number one track, over the place where the brake on the car was.

William B. Murphy testified that he was sergeant of the Back Bay Park police, and made an examination of the bridge when he was told that there had been an accident there; and that he found blood on the road-bed, and that the pendants of the tell-tale were nearly all gone.

This was all the material evidence in the case, the defendant offering no evidence.

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The defendant asked the judge to instruct the jury, among other things, as follows: "1. Upon all the evidence in the case, the plaintiff cannot recover. 2. The jury cannot find for the plaintiff in the case at bar, on the ground that the car on which Maher was, was negligently run under the bridge. . . . 4. There is no evidence upon which the jury can find, in the case at bar, that the car upon which Maher was, was negligently run under the bridge. . . . 7. Evidence as to the arrangement of the train is only to be considered upon the question of due care."

The judge refused to give these instructions, except so far as they are embraced in the instructions given; and the defendant excepted.

The judge instructed the jury, among other things, as follows:

"This action is based upon two allegations of negligence, or carelessness, on the part of this defendant; one is, that they ran the car carelessly; and the second is, that they did not sufficiently guard the approaches to this bridge. The plaintiff, in order to maintain this action, must satisfy you of two things. She must satisfy you that the defendant was careless, and careless in the respect in which she charges carelessness; and second, she must also satisfy you that the intestate, the deceased, was at the time of this accident in the exercise of due and proper care, taking care of himself. There is a third proposition which I will state later on, because it does not connect itself directly with these two. You have been addressed upon these complaints, particularly as to the latter one; that is, that the approaches to the bridge were not sufficiently guarded. The particular defect in the guarding of this bridge which is complained of is that these suspended wires or tell-tales were absent, so that, upon approaching the bridge, he had not the benefit of that precaution.

"The next question for you to consider is whether that defect was the cause of this accident; because it makes no difference how defective the machinery may be, or all the apparatus that is provided for the safety of the employees, unless the defect is the cause of the injury; and therefore you are to find in this case, in order to render a verdict for the plaintiff, not only that this was defective, but that that defect was the cause of his injury, of his accident, and cost him his life.

"Then she must prove to your satisfaction that this man was, at the time of the accident, in the exercise of due and proper care.

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In this case, upon the question as to what this man was doing at the time, of course, you have not the benefit of his statement. You have not the benefit of the statement of anybody who saw him at the instant. You are asked to judge as to whether he was or was not in the exercise of due care by such evidence as has been submitted to you, which tends to show where he was a short time, a few minutes more or less, before this accident occurred, and what he was doing, and what his duty was. He was charged with one of these cars and with a brake there. He was not required to stand at his brake and come in contact with that bridge knowingly. That was not his duty. He was required to take care of the brake, and to use proper skill and care in doing . . . it, in performing that duty, and also in taking care of himself.

"You must be satisfied, upon the evidence, affirmatively that he was at the time of this accident in the exercise of that degree of care of a prudent man engaged in that business, and having experience, the experience which the evidence in this case discloses that this man had, — whether more or less, that will be for you to judge, — and from which you are to find that he was in the exercise of care as I have described it to you. If the evidence fails to prove that to your satisfaction, then the plaintiff has failed altogether, because she must satisfy you by proof. . . . It must be evidence that brings conviction to your minds, so that you would be willing to act upon it in an important transaction in which you yourselves are interested. . . . For the law says that if his own want of care contributed in any measure to his accident, however serious the accident is, the plaintiff cannot recover. She must satisfy you that it was the fault of the defendant throughout, and, if she has satisfied you of that, then, so far as those two propositions are concerned, the plaintiff would be entitled to a verdict.

"Then there is a third question which I referred to a moment ago, that under this action you must be satisfied that the death of this man was instantaneous, in other words, that there was no period of conscious life or suffering after he was struck. If these three questions are answered by you in the affirmative, that the defendant was negligent in not having its tell-tales, and the absence of those tell-tales was the cause of this man's accident, and that he was in the exercise of due care at the time, so that

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his own carelessness or want of care did not in any measure contribute to his injury, and you further find that the death was instantaneous, and find all those propositions upon the evidence in the affirmative, then the plaintiff has made out the case, so far as the liability is concerned, and the defendant would be liable, if you are satisfied upon all those questions."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. Hudson, for the defendant.

L. M. Child, for the plaintiff.

BARKER, J. 1. There is sufficient evidence to justify the inference that the deceased was in the exercise of due care. His duty required him to be on the rear car of the train. This was a tall refrigerator car attached to the rear end of the caboose. When he left the caboose, he was told to get on the top of this car with the flag, ready to flag the rear end; and one witness saw him getting on the car, holding to the brake-wheel. His duty required him to watch the rear of the train, and it may well be inferred that he rode on the top of the car with his face to the rear. It was not negligent for him so to ride, although he knew there were low bridges under which the car must pass, because he had the right to suppose that the tell-tales would be in order and in their proper position, and that he would by means of their action, receive sufficient warning to enable him to avoid collision with bridges. There is a fair presumption that he, a man skilful and able in his business, who had just entered on the service of a new employer, and who, in the performance of an explicit order, had gone to attend to work which required him to look in the direction opposite that where the danger lay by which he was killed, was engaged in watching the rear of the car, and if so he could not be blamed for not knowing he was about to come in contact with the bridge. In *Corcoran* v. *Boston & Albany Railroad*, 133 Mass. 507, it was impossible to say whether the deceased was knocked from the train by contact with overhanging ice, or fell upon the track from some other cause. In *Riley* v. *Connecticut River Railroad*, 135 Mass. 292, the position of the brakeman was at the head of the train, and his duty required him to keep watch in the direction of the bridge. So in *Shea* v. *Boston & Maine Railroad*, 154 Mass. 31,

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the employment necessarily required him to look out for all engines and trains, as they might come at any time. In the present case the deceased was required to look out for a bridge only when warned by the tell-tales. In *Tyndale* v. *Old Colony Railroad*, 156 Mass. 503, it was the duty of the deceased, as track inspector, to keep his tricycle out of the way of passing trains; and there was no evidence to show what he was doing at the time of the accident or how it occurred. We regard this case as analogous to *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379. The deceased was rightfully in the place of danger, and was not wanting in diligence in suffering himself to come in contact with a bridge of which the tell-tale gave no warning.

2. Assuming that the deceased was knocked from the rear car by the contact of his head with the bridge, the evidence justifies the inference that he died instantly, or without conscious suffering. The speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death. The men in the caboose, although very near him, heard no outcry, and the defendant's workmen upon the other train, who picked up the dead body, were not called as witnesses. It is fair to infer that, if they had seen any indication that the deceased lived after receiving the blow upon the head, they would have been called. See *Mulchahey* v. *Washburn Car Wheel Co.* 145 Mass. 281.

3. We have no doubt that the defendant is not answerable for the fact that the refrigerator car was drawn behind the caboose, or that the train was run under the bridge with the car in that position. Any risk to which the deceased was exposed because the refrigerator car was behind rather than in front of the caboose was obvious and apparent, and was assumed by the deceased; nor was the speed of the train, if upon the evidence it could be found excessive, a circumstance for which the defendant was answerable under the declaration. The second and fourth requests might therefore have been properly given, but we see no reason to suppose that the omission to give them worked any injury to the defendant. The report of the charge makes it evident that, while the claim that the car was run carelessly was adverted to, the case was put to the jury by the presiding justice upon the other contention of the plaintiff only;

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namely, that the defendant did not sufficiently guard the approaches to the bridge. They were instructed that the plaintiff must satisfy them that the defendant was negligent in not having its tell-tales, and that the absence of the tell-tales was the cause of the accident, and under the charge the jury could not have rendered a verdict for the plaintiff upon the other theory of the case. It is apparent that the omission of the presiding justice to deal specifically with the second and fourth requests was because he had in effect disposed of them by telling the jury that in order to find for the plaintiff they must be satisfied that the defendant was negligent in not having the tell-tales, and that their absence was the cause of the accident. When he put the case upon that basis, the matters embraced in the second and fourth requests became immaterial, and were doubtless considered so by him; and unless the defendant called his attention, after the charge, to the omission to give them as a ground of exception, we think the defendant must be taken to have acquiesced in this treatment of the case; while the jury were not distinctly told that they could not find for the plaintiff on the ground that the car was negligently placed or run, they were so told in effect, and we see no reason to believe that the verdict was upon any other ground than the absence of the tell-tales.

Exceptions overruled.

MARCIA A. NORRIS *vs.* EDWARD H. SAXTON.

Suffolk. November 30, December 1, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Law of the Road — Collision at Junction of Streets.

The law of the road, Pub. Sts. c. 98, §§ 1, 4, does not apply to a highway formed by the junction of two streets which cross each other diagonally.

TORT, in two counts. The first count was for injuries to the plaintiff, and to her horse and carriage, alleged to have been caused by the defendant's negligence. The second count was upon the Pub. Sts. c. 98, §§ 1, 4, for the same cause of action.

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Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, the material part of which is, in substance, as follows.

The plaintiff and the defendant were, between three and six o'clock in the afternoon of May 17, 1889, driving in separate carriages on a highway in Boston, and at some place on this highway the defendant's horse collided with the plaintiff's carriage. The highway where the collision occurred was formed by the junction of Beacon Street and Commonwealth Avenue, which at this place crossed each other diagonally. Beacon Street crossed Commonwealth Avenue in a southwesterly and northeasterly direction, and Commonwealth Avenue crossed Beacon Street in a northwesterly and southeasterly direction. There was no evidence whether the highway where the collision occurred was Commonwealth Avenue or Beacon Street. There were double tracks of the West End Street Railway Company on part of this highway. These tracks ran from Beacon Street northeasterly of the junction, and continued on Beacon Street southwesterly of the junction. The width south of the car tracks between the rail and the curbstone of the highway formed by the junction varied, the narrowest place being twenty-five feet. The evidence was conflicting as to width between the rail and the curbstone of the highway north of the car tracks. The plaintiff's evidence tended to show that the width was between fifteen and twenty feet. The defendant's evidence tended to show that there was only sufficient space for a single carriage and a man on horseback to pass each other.

At the time of the collision, the plaintiff was driving on this highway easterly, towards Boston, and south of the car tracks. The defendant had, just previously to the collision, driven from Commonwealth Avenue southeasterly of the junction. From the avenue the defendant drove along the junction in a northwesterly direction to the car tracks, at a place where carriages coming from Commonwealth Avenue southeasterly of the car tracks crossed the tracks to Commonwealth Avenue northwesterly of the tracks. The defendant introduced evidence tending to show that, as he was about to cross the car tracks on his way to Commonwealth Avenue northwesterly of the tracks, an electric car suddenly came up behind his carriage, frightened his

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horse, and caused his horse to spring sidewise into the plaintiff's carriage, which was at that time passing at his left; and that if the defendant's horse had not sprung sidewise, the collision would not have occurred. The plaintiff testified, on cross-examination, that, if the defendant's horse had continued on the course he was going, he would not have interfered with her carriage; and she contended that the defendant was not, at that time, travelling on the right of the middle of the travelled part of the highway.

The defendant asked the judge to instruct the jury, that, if the travel east and west on the road where the plaintiff was driving at the time of the accident was south of the car tracks, and the defendant was at that time driving on the right of the middle of the travelled part, leaving sufficient room for the plaintiff's carriage to pass the defendant, he was not, in so driving, violating the law of the road, or guilty of negligence.

The judge instructed the jury on this part of the case as follows: "You are called upon to decide in the case at bar this simple question, Did the defendant seasonably turn to the right of the middle of the travelled part of that road? For the purposes of this case, the court holds that that road is the space between the curbs upon either side; it is not the space lying to the south of the railroad tracks, between them and the southerly curb, but the entire space between the curbs, including the space upon which are the railroad tracks. So you are entitled, in considering this question under the second count, to determine that the middle of the travelled part of the road is the middle between the two curbs of that way, the edgestones on the sidewalks on each side of the way. And the question comes, whether the defendant seasonably turned to the right of the middle part of that space which is between those curbs."

The jury returned a verdict for the plaintiff on the second count; and the defendant alleged exceptions.

E. H. Pierce, for the defendant.

O. A. Marden, for the plaintiff.

BARKER, J. The verdict for the plaintiff was upon the count under the Pub. Sts. c. 98, §§ 1, 4, commonly called the law of the road. But the highway where the collision occurred was formed by the junction of Beacon Street and Commonwealth

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Avenue, in Boston, which at this place crossed each other diagonally. The law of the road does not regulate the manner in which persons shall drive when they meet at the junction of two streets, and could not therefore give the plaintiff a right of action. *Garrigan* v. *Berry*, 12 Allen, 84. See also *Lovejoy* v. *Dolan*, 10 Cush. 495, 497. As the statute did not apply, the verdict founded upon it must be set aside, and a new trial granted. We see no occasion to discuss the numerous exceptions argued, and express no opinion upon them. *Exceptions sustained.*

GRACE WIDMER *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. December 1, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Personal Injuries — Street Railway — Negligence — Action.

A woman who was familiar with the locality, which was a crowded thoroughfare in a city, started, accompanied by a police officer who was stationed there, to cross a street, at the corner of another street. She stopped, with the officer, in the middle of the crossing near the side of the railway tracks on the street, and waited for a car to go by, which she saw before it reached her. She was looking north at some teams, which were not near enough to injure her, while the car was coming from the south. She saw the front end of the car go by her, and thought she was far enough from it to be safe, but did not notice the rear end of the car. As the car turned the corner of the two streets at ordinary speed, she was struck on the temple by the handle on the rear dasher of the car. There was no switchman at the corner, and the conductor was off the car adjusting the switch. *Held*, in an action against the railway corporation for the injury, that there was no evidence of negligence on the part of the defendant.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

The injuries complained of were received by the plaintiff, on June 5, 1891, on Washington Street, at the corner of Summer Street, in Boston. Winter Street is opposite Summer Street

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and west of Washington Street. It was admitted that Washington Street was an accepted street of the city of Boston on June 5, 1891, and that the horse car hereinafter mentioned was at that time operated by the defendant.

John W. Little testified that he was a police officer, and stationed at the corner of Washington Street and Summer Street in June, 1891; that at that time the building at the southeast corner thereof was being repaired, and about one half of the sidewalk on Washington Street was there obstructed; that there was a double track in Washington Street which extended straight down Washington Street and also turned down Summer Street; that the curve began on the crossing, which was about fourteen feet wide, and the curve was a sharp one around the corner into Summer Street; that this was the most crowded corner in Boston from about half-past ten o'clock in the morning until about half-past six o'clock in the afternoon; that he saw the plaintiff on June 5, 1891, a little after twelve o'clock at noon; that she started across the street ahead of him, and stood about three or four feet from him to the north; that he stood with his body and face turned towards the north, and she stood directly in front of him, with her head turned north, both being between the tracks, her body turned toward the east; that she was struck on the right temple by the handle on the rear dasher of an Atlantic Avenue horse car going north and into Summer Street; that she was on the crossing, and had not been there more than a minute; that at that time the street was clear, and nothing was on the crosswalk, which was about fifteen feet wide, and she stood in about the centre; that the car was going as cars usually go; that the horses were trotting around the curve; that he did not see her in time to save her, but caught her in his arms after she was struck and took her to the sidewalk; that the conductor was off the car turning the switch; and that there was no switchman there. On cross-examination, he testified that he was stationed at the corner for the purpose of stopping cars if likely to interfere with people on foot crossing the street; that he did not stop this car, and had no occasion to; that the distance between the tracks was about four feet, and the plaintiff was standing between the tracks; that he knew where to stand and be safe, but perhaps another person would

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not; that the point of the switch was twelve feet south of the south line of the crossing; that the car came close to the curbstone at the southeast corner of Summer Street and Washington Street, and would have to be pretty well on the curve before the rear end could be at the middle of the crossing; that the rest of the crosswalk to the opposite corner was clear; that there was nothing to occasion the plaintiff to stand so near the car; that there was at that time plenty of room for people to stand where there would be no danger of being struck; that no other teams were passing, and there was nothing on the westerly side of the street to cause her to get where she was; that the car was not going rapidly, jogging around the corner at the regular rate as they always go, and stopped just around the corner on Summer Street, where all those cars make a stop; that he could not tell how long she had stood there before she was hit; that she saw the car coming, and stopped to let it pass; and that there was nothing unusual in the way this car went round the corner.

The plaintiff testified that she was eighteen years old on June 21, 1891; that she was working on Hawley Street in June, 1891; that on the 5th of June she had been on Winter Street, and went down the sidewalk on the south side of Winter Street to Washington Street; that when she got to the corner of Winter Street and Washington Street the street was crowded; that she stepped down from the curbstone, and then stepped back; that the police officer, Little, came towards her, waved his hand, and said, "Come on"; that she stepped down and started across the street with him, he taking hold of her arm; that she first saw the car about opposite the store on the southeast corner of Washington Street and Summer Street; that the car was then stopped or just starting in front of the store; that at the time of the accident she was standing close to the officer, on the same line with him, and about four feet from the east track; that she turned her head toward the north, and was looking at teams coming from that direction, but not near enough to injure her, and thought she was far enough from the car to be safe; that she did not know what happened; and that she was struck, and knew no more until she was standing against the corner. On cross-examination, she testified that she knew the corner; that she had been there a great many times, and knew it was a

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crowded corner; that she saw something yellow go by her; that she first saw the car just starting up, and about fifty feet from her; that she saw the front end go by her; that she knew if she stood too close to the car she would get hit, and that the car could not turn out; that she did not know that the car moved more than twice its length; that she thought she was a safe distance from the car; that she was with the police officer; that she thought she was safe partly because the police officer was there, and partly because she supposed she was safe; and that she did not notice the rear end of the car.

Charles Boyer testified that he was a police officer; that he knew the corner of Washington Street and Summer Street in June, 1891; that the grade of Summer Street was lower than that of Washington Street; that there was greater travel there than at any other point in Boston; that Atlantic Avenue cars ran down Summer Street, and all other cars along Washington Street; that Atlantic Avenue cars ran every fifteen minutes, and oftener in summer; that the switch was about fourteen feet south of the south line of the crosswalk, and the east rail of the east track was eight feet from the east curbstone of Washington Street at the line of the switch, about seven feet from the curbstone at the south line of the crossing, and two or three feet from the curbstone at the corner; that at the time of the accident he was standing on the east side of Washington Street, at the curbstone, and about five feet south of the south line of the crossing; that he saw the plaintiff on the opposite side of Washington Street; that officer Little approached her, and motioned her to cross; that she stepped off the sidewalk and came across the street with him, and both halted by the east track; that Little faced north, and she turned her head north, her body facing east, both apparently looking at the same object; that the handle of the hind dasher struck her on the head hard, she staggered, and Little caught her and brought her to the sidewalk; that it was an open car, and the conductor was off the car attending to the switch, and no switchman was there; and that the horses started off at a smart walk, and he did n't think they were trotting.

The judge, at the request of the defendant, ruled that there was no evidence which would warrant a verdict for the plaintiff,

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and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. R. Smith, for the plaintiff.

M. F. Dickinson, (*W. B. Sprout* with him,) for the defendant.

KNOWLTON, J. At the trial of this case there was no evidence of negligence on the part of the defendant. It was an undisputed fact that the plaintiff was standing near the side of the track, waiting for the car to go by, and she testified that she saw it before it reached her, that she was looking north at some teams, while the car was coming from the south; that she saw the front end of the car go by her, and thought she was far enough from it to be safe, and that she was struck on the right temple by the handle on the rear dasher of the car as it went round the corner. There was no pretence that there was any defect in the car or in its equipments, or in the track, and the plaintiff testified to nothing unusual or improper in the management of the car.

There was no reason why the driver should not drive past her and around the corner, for he had no reason to suppose that she would come so near the rear of the car as to be struck when it went by. The only witnesses who testified besides the plaintiff were two police officers, one of whom was stationed there for the better protection of the public, and he testified that he "did not stop this car, and had no occasion to"; that "the car was not going rapidly, — jogging around the corner at the regular rate as they always go." The other, in describing the rate of speed of the car at the time of the accident, said "that the horses started off at a smart walk, and he didn't think they were trotting." There was no evidence of negligence which had any connection with the accident in the facts that there was no switchman stationed there, and that the conductor turned the switch.

The bill of exceptions discloses nothing that the defendant did or neglected to do of which the plaintiff can justly complain.

Exceptions overruled.

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ALFRED ELA *vs.* LUCIA ELA & others.

Middlesex. December 5, 6, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Account — Trover — Statute of Limitations — Jurisdiction — Infant — Laches.

Where a bill in equity for an account states a case disclosing a liability in trover, which is barred by the statute of limitations, this court will not entertain jurisdiction merely on the ground that the property, when converted, belonged to an infant.

BILL IN EQUITY, filed in the Superior Court, on May 12, 1891, against Lucia Ela, Walter Ela, and Richard Ela, alleging the following facts.

Richard Ela, of Washington in the District of Columbia, died in that city on January 8, 1863, intestate, leaving a widow, Lucia, and four children, all minors, namely: Margaret K., born July 29, 1845; Walter, born September 23, 1848; Richard, born November 30, 1850; and Alfred, born October 14, 1857; of whom Alfred, the youngest, is the plaintiff in this suit, and the others, excepting Margaret and including Lucia, are defendants. Lucia Ela and Endicott King of Washington were appointed administrators of the estate of Richard Ela, deceased, and duly administered the same and settled their final account. Immediately after the decease of Richard Ela, the family furniture was sold, or removed, and the house vacated by the widow, who removed at once to Topsham, Maine, in which State, on April 4, 1864, she was appointed by the Probate Court guardian of all the children. She never resumed her residence in Washington. Lucia Ela, as guardian, filed an inventory in the Probate Court, charging herself with $13,598.48 for each child, and gave bond, with sureties in the sum of $100,000, but no division of the estate of the deceased was made. The whole thereof remained in the hands and management of King until February, 1872, when the joint fund was surrendered into the hands of the defendant Richard Ela, of Cambridge in this Commonwealth. Three of the children were then of age, and the

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transfer of the property from King to Richard Ela was made with the knowledge and consent of Margaret and Walter. Lucia Ela also had knowledge of this transfer, and consented for herself as to the portion of the property which belonged to her, and as guardian as to so much thereof as belonged to Alfred.

About February 13, 1873, a division of the joint fund was made, by which the bonds, stocks, and other property were allotted in severalty to the persons interested, and they were placed in separate envelopes, marked with the names of the several owners, and deposited in a safety vault in Boston. The division was fairly and equitably made, and was ratified and assented to by the three children who had reached majority, and by Lucia Ela for herself and as guardian of Alfred. Thereafter all the funds of the estate were in the hands and management of Richard, except as hereinafter set forth, and were by him very largely lent to and invested in the manufacturing and trading business of one D. G. Pratt, and his successors in that business, and lost. So far as Alfred was interested, the possession and management of these funds by Richard was with the knowledge and consent of Lucia as guardian. Walter was also acquainted with the disposition made of these funds by Richard. In July, 1873, Richard, being about to be absent from the United States for an extended tour in Europe, the possession and management of the funds, with the knowledge and consent of Lucia, devolved upon Walter. While thus in the possession and control of the property of Alfred, assuming to act for Richard, and acting with the knowledge and consent of Lucia, Walter removed from the place of deposit and converted to his own use property of Alfred consisting of bonds of the city of Portland, Maine, to the amount of $2,000, and bonds of the town of Dexter, Maine, to the amount of $4,500, and collected and converted to his own use sundry sums of money paid as interest, dividends, and rents.

The assets of the estate of Richard Ela, deceased, had been for the most part dissipated and lost previously to July, 1876, but of this Alfred remained ignorant. He had acquired the idea that he had inherited from his father's estate about $30,000, and in the belief that this sum, or the income thereof, was

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available for his maintenance and education, he went to Germany in July, 1876, and began studying there. He continued there until November of the same year, when Walter sought him out, and, fraudulently concealing that he had converted to his own use property of Alfred, informed him that the property of the family was not sufficient to enable both of them to pursue their studies in Europe, and persuaded him to return to Cambridge. Walter remained in Europe and studied in London, Paris, and Vienna.

D. G. Pratt, above named, was carrying on business in his own name in Cambridge in 1872, and was in embarrassed circumstances. About this time Richard began lending Pratt money at very high rates of interest. Walter also lent Pratt sums of money during the absence of Richard in Europe, in 1873 and 1874. In June, 1874, Walter became a special partner in the business of D. G. Pratt, contributing to the partnership the sum of $15,000, borrowing that sum by pledging certain securities belonging to Alfred, among which were bonds of the city of Portland to the amount of $3,000, and bonds of the city of St. Louis to the amount of $4,000. The special partnership composed of Walter and Pratt was dissolved in December, 1876, and the firm of D. G. Pratt and Company was formed, in which Richard was the "Company." In December, 1877, D. G. Pratt and Company assigned their assets to a trustee for the benefit of creditors, and the trustee permitted Richard to continue to prosecute the business under the name of Richard Ela.

Alfred was desirous of returning to Europe to continue his studies which he had begun there, but Richard informed him that no money was available for that purpose, giving as a reason that all the money of the family had gone into the business then being conducted under the name of Richard Ela, and other enterprises; and Richard stated further, that, if Alfred wished any money for his own purposes, he must engage in business with Richard, that being the only place from which any could be recovered. From that time Alfred assisted his brother to a greater or less extent in the conduct of the business until July, 1879, when, at the instance of Richard, he purchased the assets of the business formerly of D. G. Pratt and Company, and entered into a partnership with Richard under the firm name

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of Ela Brothers. During the existence of the firm of Ela Brothers, Alfred made to Walter, who was then in the receipt of a considerable income from his practice as a physician, frequent applications for loans of money to the firm of Ela Brothers. The bill also alleged that Walter, fraudulently concealing and not disclosing to Alfred that he had converted property belonging to him, made it a condition of such loans that Alfred should become personally liable for the same; and that in November, 1882, it appearing that the business of Ela Brothers had not been profitable, and Alfred having expressed his determination to retire from the business, both Richard and Walter required him to execute a release to Lucia Ela, guardian, of all claims against her as such, as a condition precedent to any arrangement to which they would consent for relieving him from the liabilities of Ela Brothers. Such a release Alfred was induced to execute, on the further representation to him made by Richard in the presence and hearing of Walter, which Walter neither denied nor contradicted, that Alfred could not recover any of his property, and that no one was liable for its loss unless it might be Richard. No further explanation than is set forth in this bill was ever given to Alfred concerning the matters and things done by Lucia, Richard, or Walter in the management of the funds derived from the estate of the deceased. Until October, 1889, Richard, who is, and was at the time of the majority of Alfred, a lawyer by profession, was the only adviser of Alfred in family matters, either by relationship or professionally.

In October, 1889, Lucia being extremely ill and not expected to live, a new arrangement with reference to some remnants of the family property was proposed, to which Alfred was not willing to accede; he consulted counsel, and, in consequence of their advice, took possession of certain papers, which he removed from the family residence in Cambridge to Boston. Examination of these papers first disclosed to him that his mother was his guardian by appointment of the Probate Court in Maine, and he immediately began proceedings for a settlement of her account in that jurisdiction. Further examination of these papers, which he continued to make, first disclosed to him, in the spring of 1890, that Walter had made disposition of bonds and moneys

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as alleged in this bill. Since the plaintiff came to a knowledge of the conversion of the property by Walter as above set forth, negotiations initiated by the defendants have been pending for an adjustment of the claim herein made. Lucia has never settled her account as guardian, and has never transferred to Alfred, nor expended in his behalf, more than a very small part of the property which came into her hands as his guardian, and for which she became responsible.

The prayer of the bill was for an account; and that it might be decreed that Walter should pay to the plaintiff, without the intervention of the said Richard Ela, Lucia Ela, or the sureties on her bond as guardian of Alfred, the sum found due on accounting; and for other and further relief.

The defendants answered, denying all allegations of fraud or concealment, and demurred separately to the bill, for want of equity. In the Superior Court, the demurrers were sustained, and the bill dismissed; and the plaintiff appealed to this court.

G. D. Williams, for the plaintiff.

A. E. Pillsbury & R. Ela, for the defendants.

HOLMES, J. The allegations of the bill, so far as they concern the only defendant against whom relief is sought, are, that while the plaintiff was a minor and under the guardianship of his mother in Maine, the defendant, his brother, somewhere between July, 1873, and July, 1876, it would seem in 1873 and 1874, being intrusted by the guardian with the possession of property belonging to the plaintiff, converted a part of it to his own use; and that in November, 1882, the plaintiff executed a release to his guardian, being partly induced to do so by a representation, not alleged to have been fraudulent or even false, made by another brother in the said defendant's hearing, and not contradicted by the latter, that no one was liable for the loss of the property except the speaker. The plaintiff came of age on October 14, 1878, but says that he only found out the alleged conversion in 1890.

It will be perceived that a plain case of liability in trover is stated. But no facts are set out to remove the bar of the statute of limitations if the plaintiff had sued at law. We presume it is for this cause and in the hope of finding a more latitudinarian rule in equity that the proceeding is by way of bill, relying upon the old English principle, extended from real

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to personal property, that any one who enters upon an infant's property may be made to account. Co. Lit. 89 *b*, 90 *a*. *Newburgh* v. *Bickerstaffe*, 1 Vern. 295. *Cary* v. *Bertie*, 2 Vern. 333, 342. *Morgan* v. *Morgan*, 1 Atk. 489. *Dormer* v. *Fortescue*, 3 Atk. 124, 130. *Blomfield* v. *Eyre*, 8 Beav. 250. *Wyllie* v. *Ellice*, 6 Hare, 505. *Quinton* v. *Frith*, 2 Ir. Rep. Eq. 396. *Chaney* v. *Smallwood*, 1 Gill, 367.

Whether this jurisdiction, which was taken under very different circumstances from the present, exists in this Commonwealth, or whether, if it exists, it should be exercised where the relations between the plaintiff and his guardian cannot be settled, are questions upon which we express no opinion. It is enough to say, that it cannot be made use of in the way in which it is sought to be used here, as a mere device to get rid of the statutory limitation in a case which is wholly within the policy of the act. In *Lockey* v. *Lockey*, Prec. Ch. 518, "My Lord Chancellor was clear of opinion, where one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, that the statute of limitations is a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of a court of equity, the statute shall be no bar to, for he might have had his action of account against him at law. . . . If the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court; and there is no sort of difference in reason between the two cases." See Lewin on Trusts, (9th ed.) 1013. *Knox* v. *Gye*, L. R. 5 H. L. 656, 674. Here not only have twice six years elapsed since the plaintiff came of age, but more than six years have passed since he settled with his guardian, and thus was put on inquiry as to what property he was entitled to. The plaintiff shows such laches on the face of his bill that it must be dismissed. See *Fogg* v. *Price*, 145 Mass. 513, 516.

Bill dismissed.

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JOHN F. MOORS *vs.* PRESCOTT BIGELOW.

Suffolk. December 7, 8, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Partnership — Mistake — Evidence.

Upon the dissolution of a partnership existing between A. and B., there was an understanding or agreement that the settlement of the affairs of the partnership should be made on the basis of a payment by B. to A. of the balance due, as shown by a proper adjustment of all the accounts on the books of the firm. A certain sum was paid as that balance, but an item of a much larger amount in favor of A., which should have been included, was omitted by a mistake of A., and either by a mistake of B. or with knowledge that it was not included. A. acted in the belief that the account stated was correct. *Held*, that A. could maintain a bill in equity against B. to recover the sum so omitted.

If the inquiry, upon the hearing of a bill in equity, is in regard to a contract of settlement of the affairs of a partnership between the plaintiff and the defendant, and the reasons and motives for making it, evidence as to whether the plaintiff subsequently advanced the overdue interest on a first mortgage of property, a second mortgage of which was held by him as collateral security for an account guaranteed by the defendant in the settlement, is properly excluded.

BILL IN EQUITY, filed in the Superior Court, alleging, as amended, the following facts.

On March 15, 1888, the plaintiff formed with the defendant a copartnership, under the style of "The Advisory Investment Company, John F. Moors and Prescott Bigelow, Managers," for the purpose of doing business as brokers of stocks and bonds; and on or about February 6, 1889, the style of the firm was changed to "Moors and Bigelow." All the capital of the firm was furnished by the plaintiff, the defendant furnishing a seat on the stock exchange.

On or about June 6, 1888, the defendant borrowed from the firm the sum of $2,250, and gave as security for the same a promissory note for that amount, signed by Walter Gassett, payable to the defendant or order, and by him indorsed to the firm as follows: "Pay to the order of the Advisory Investment Company, John F. Moors and Prescott Bigelow, Managers. Prescott Bigelow." The debt of the defendant was not evidenced by any instrument in writing, but was entered on the firm book of account as a loan to him, and the same still stands upon said

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book as unpaid. About July 1, 1889, the defendant, as further security for the loan, which was then due, and in consideration of the continuance of the same, gave to the firm a note for $1,750, signed by Walter Gassett, payable to the defendant or order, and by him indorsed to the firm as follows: "Pay to the order of Moors and Bigelow. Prescott Bigelow."

About October 1, 1889, both of the notes being then overdue and unpaid, the firm, for the purpose of collecting the amount of the notes from the maker, indorsed the notes to the defendant. It was agreed and understood between the plaintiff and the defendant that the notes did not by the indorsement cease to be the property of the firm; that they were not thereby released or discharged from liability to the firm as security for the debt of the defendant to the firm; and that the proceeds of the notes when collected should be applied, as far as might be necessary, to the payment of the debt due from the defendant to the firm.

On January 1, 1891, the firm was dissolved, and among the terms of the dissolution, which were not in writing, it was agreed that all the assets of the firm, including all debts due to the firm, but not including the seat on the stock exchange, should become the property of the plaintiff individually. The debt of the defendant to the firm, together with the notes held as security for the same, thereby became the property of the plaintiff individually, and the debt of the defendant to the firm became payable to the plaintiff individually. If the defendant should prove the payment, cancellation, or satisfaction of any amount found due from him to the plaintiff, the same did not include said loan or any part thereof, but the record of the loan upon the books of the firm was by mistake entirely overlooked, and omitted in the accounting between the plaintiff and the defendant upon which such alleged payment and satisfaction were based. By the terms of the dissolution the plaintiff assumed all indebtedness of the firm. The debt of the defendant was due and unpaid, although the plaintiff had often demanded payment of the defendant, who refused to pay the same.

The defendant claimed, notwithstanding the facts above recited, to hold the notes wholly for his own benefit, and free from any lien in favor of the firm or of the plaintiff; and the defendant proposed and intended and was proceeding to collect the

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amount of the notes, and intended to use the proceeds of the same for his own purposes, regardless of the rights of the plaintiff.

The prayer of the bill was that the defendant be decreed to pay to the plaintiff the sum of $2,250, with interest; that the defendant should hold the notes subject to the agreement above set forth as security for the payment to the plaintiff of $2,250, with interest; that the defendant might be ordered to apply the proceeds of the notes when collected, so far as might be necessary for the purpose, to the payment of the amounts due to the plaintiff; and that, until the amount so due to the plaintiff was paid, the defendant be enjoined from selling, negotiating, or indorsing the notes, or either of them, and from disbursing any amount which had been or should be collected upon the notes, except to apply such amounts to the payment of the amount due the plaintiff.

In the Superior Court, a decree was entered for the plaintiff, in accordance with the prayer of the bill; and the defendant appealed to this court. The nature of the evidence appears in the opinion.

T. J. Homer, for the defendant.

G. D. Burrage, (*E. T. Cabot* with him,) for the plaintiff.

KNOWLTON, J. The principal question that arises on this appeal is whether there was evidence to sustain a finding that would warrant the decree which was entered. The evidence is reported at length, and the judge rightly found from it an understanding or agreement of the parties that their settlement of the affairs of the copartnership should be made on the basis of a payment by the defendant to the plaintiff of the balance due, as shown by a proper adjustment of all the accounts on the books of the firm. The evidence tended to show that $344.58 was paid over as that balance, and that an item of $2,250 in favor of the plaintiff, which should have been included, was omitted. The evidence well warranted the finding that this omission was made by a mistake of the plaintiff, and either by a mistake of the defendant or with knowledge that it was not included, and that the plaintiff was acting in the belief that the account stated was correct. In either view, the plaintiff is entitled in equity to a correction of the mistake, and we discover no error in the proceedings.

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If the objections to the exclusion of evidence are open on this appeal, the rulings of the court appear to have been correct.* The inquiry was in regard to the contract of settlement and the reasons and motives for making it. Whether the plaintiff did or did not subsequently advance the overdue interest on the first mortgage was immaterial, as affecting the situation at the time the arrangement between the plaintiff and the defendant was made. *Decree affirmed.*

SUSAN F. McGUIRE & another *vs.* ANNE DEVLIN & others.

Suffolk. December 9, 1892. — January 5, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Trust — Parties — Statute of Limitations — Laches.

A testator left a widow and several minor children, and by his will, which was admitted to probate, gave, besides other bequests, legacies to his two daughters, and the bulk of his property to the widow in trust for the benefit of his children, to be applied in her discretion. The widow never acted as trustee under the will, and the provisions of the will were never executed. The testator also left a profitable business, which was carried on by the widow, with the assistance of her children, and which increased largely in value. The widow and the children lived together as one family until the children came of age and married, and they assisted her in the work of the house as well as in the business. She was recognized by the children as the head of the household and of the business, and she had the possession, control, and management, with the assent of the children, of all the property left by her husband, and of its increase. There was never any express agreement as to wages, board, or clothing, but all were supported from the proceeds of the business until marriage or death. No account was kept of earnings or services, and no charges were made or credits given, and no books of the business were kept. The two daughters married, each receiving a certain sum upon her marriage, and they continued to render services in the house and in the business after their marriage. Within six years after such services were rendered, the two daughters brought a bill in equity against their mother and brothers to recover their share of the fund. The case was referred to a master, who found that the plaintiffs were entitled to recover a certain sum for their services, their shares of a deceased sister's legacy, which had

* The evidence excluded was whether the plaintiff, subsequently to the settlement, advanced the overdue interest on a first mortgage of property, a second mortgage of which was held by him as collateral security for an account guaranteed by the defendant in the settlement.

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not been separated from the estate, and their own legacies. It was also found that the services of the plaintiffs were rendered upon the understanding, which was common to the plaintiffs and to the defendant, their mother, that the plaintiffs should derive pecuniary benefit from the successful prosecution of the business, and that all were to work together. The understanding did not go so far as to fix the terms or the extent of the benefit they were to receive, but this was left very much to the mother, who took and held the property, but she had not the discretion or right to refuse to allow a reasonable share or sum to the plaintiffs, to be determined in view of the result of the business; and she did not repudiate this understanding, or her obligations under it, until within six years prior to the institution of this suit. *Held*, that the mother was a trustee; that the plaintiffs were entitled to recover the sums found by the master; that the defendants other than the mother were properly made parties defendant; and that the defences of the statute of limitations and of laches were not open.

BARKER, J. The case reported for our determination may be thus stated. The plaintiffs are children of Anne Devlin, one of the defendants, and of James Devlin, her husband, who died in 1865. The other defendants are, with the plaintiffs, all the children of Anne and James who now remain alive. James was engaged in a profitable business at the time of his death. He then had nine children, all of whom were minors, except the plaintiff Susan F. He left a considerable amount of property, gained by his business, and it was for the interest of his family that the business should be continued.

He died testate, appointing two persons not members of his family as executors of his will. The will was admitted to probate in January, 1866, but has never been executed in any part. It appointed his wife, Anne, guardian of his minor children, but she has never acted as their legal guardian. The will gave to his wife his household furniture, and the use of certain rooms in his dwelling-house for her life, and gave small money legacies to his daughters, and the use of certain rooms to his sons, but disposed of the bulk of his property by giving it to his wife in trust, to use and apply it for the maintenance, education, and benefit of his minor children, in such manner and proportions to each as she might deem best, and with power to distribute it among his children as she might deem best by her last will. The widow has never acted as trustee under the will, and while the will has never been executed, none of the heirs have requested the executors to proceed under it, and there has been no agreement to abrogate it.

After James Devlin's death, his widow and children all lived

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in his dwelling-house as one family until the children came of age and married, the mother being recognized as the head of the family by all the children; and until this suit was brought she had the possession, control, and management, with the assent of all the children, of all the property left by her husband, and of its increase. The business, a periodical stand in the Providence Railroad station in Boston, was carried on by the family; all the children as soon as they were old enough, and until they married or died, helping in and about the store and house, under the direction of the mother, who was the head of the household and of the business. There was never any express agreement as to wages, board, or clothing, but all were supported from the proceeds of the business until marriage or death. No account was kept of earnings or services, and no charges were made or credits given, and no books of the business were kept. The plaintiff, Susan F. McGuire, was married in May, 1874. In her father's lifetime she had charge of the store, and she continued to work at the store and at the house until her marriage, and after her marriage she worked more or less every year until 1884. When she was married, she received from the family about $1,600, but she had previously earned a like sum by singing, which had gone into the common fund.

Elizabeth J. McKenna, the other plaintiff, worked mostly at the house until the marriage of Susan in 1874, and then mostly at the store until 1877, and from this time until the death of an invalid sister in 1880 mostly at the house. Each of the plaintiffs had, therefore, performed work within six years before the commencement of the suit, which was on November, 25, 1885. At her marriage in 1875, Elizabeth had also received in effect the sum of one thousand dollars. Deducting the sums severally received at their marriages, the master fixes the value of the services rendered by the plaintiffs, without interest and with some deductions for special expenses, at the sum of $4,450 for the plaintiff Susan, and $1,975 for the plaintiff Elizabeth.

Mary Ann Devlin, a sister of the plaintiffs, died in 1870. Her father's will gave her a legacy of $500, which was never paid to her or separated from the estate. At her death, each of these plaintiffs was entitled, under the statute of distribution, to

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one ninth of her personal estate, and on this account the master adds the sum of $106 to the amount which he reports due to each of the plaintiffs. Susan was herself given a legacy of $500, and Elizabeth one of $300, in the will of James Devlin, and the master reports that each is also entitled to recover the amount of her legacy with interest from the time of probate of the will, making on this account for Susan $1,095, and for Elizabeth $657; so that by the report of the master there was due to Susan in all, at the commencement of this suit, $5,651, and to Elizabeth $2,738, to be recovered by them of their mother. There is no claim that the plaintiffs have any right to recover of the other defendants, who are made parties simply that, being interested in this fund, they may have an opportunity to protect their own interests therein.

The bill charges that the plaintiffs gave their time, services, and money upon the promise that they should receive their proportion of the property and of its accumulations, and it is now found as a fact in the cause that the services of the plaintiffs were rendered upon the understanding which was common to them and to the defendant Anne Devlin, that the plaintiffs should derive pecuniary benefit from the successful prosecution of the business, and that all were to work together. The understanding did not go so far as to fix the terms or the extent of the benefit they were to receive, but this was left very much to the defendant Anne Devlin, who took and held the property; but she had not the discretion or right to refuse to allow a reasonable share or sum to the plaintiffs, to be determined in view of the result of the business, and she did not repudiate this understanding or her obligations under it till within six years prior to the institution of this suit.

At the hearing, the justice found and ruled that the plaintiffs were entitled to recover the amount found by the master, and, at the request of the defendants, reported the case for the consideration of the full court, such decree to be entered as equity may require.

1. There can be no question that the defendant Anne Devlin stood in the relation of a trustee for her children and herself to the property which was partly acquired by her husband, and in part the result of the services of the family after his death.

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But very little of it was ever her own, to do with as she chose, and the fair result of the position in which she found herself at her husband's death, and of the understanding upon which the plaintiffs and her other children contributed their services and allowed her to have possession of the property of the whole family, was that she was a trustee for all. Upon her repudiation of this understanding and of her obligations under it, the plaintiffs became entitled to maintain a bill against her to enforce their rights in the trust, and to recover their fair shares; and the other defendants, being also interested in the same fund, were properly made defendants. There is, therefore, no want of equity, and no misjoinder of parties. The defendants contend that the case is merely an aggregation of actions at law brought by two plaintiffs who have no joint interest. But, to do this, it is necessary for them to treat as specific demands or causes of action matters which are relied on by the plaintiffs only as showing in some measure what is the fair share of the trust fund to which the plaintiffs are entitled. The amount of services rendered by each, the amount of their legacies given by their father's will, and their shares in the estate of their deceased sister, are not relied on as causes of action, but are guides to be used in the determination of the question as to what is for each plaintiff a reasonable share in the trust fund. The suit is a proper proceeding in equity to charge the defendant Anne Devlin as trustee, and to recover for the plaintiffs their proper share of the fund.

2. The statement of the case shows that neither the statute of limitations nor the claim of laches is a defence to the bill. There was no time fixed between the parties when the arrangement should terminate, and Anne Devlin should account for the fund. Each plaintiff has rendered services in accordance with the understanding within six years, and six years had not expired after Anne Devlin repudiated the understanding and her obligations under it before the suit was brought. No change of circumstances is shown which would make it equitable to say that either plaintiff was guilty of laches.

The proper division of such a fund is under any circumstances a matter of difficulty. Here it is made more difficult by the fact that the trustee repudiates all her obligations under the

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trust, and that the other persons entitled to share in the trust deny its existence.

At the commencement of the suit, five only of the children of James Devlin survived. The property which he left in 1865 amounted to about $12,000, while there was in the possession of his widow and sons, in 1887, property to the value of some $75,000, the proceeds of the business which he left as carried on by the combined efforts of his widow and children under the understanding on which the bill is founded.

Under these circumstances, it certainly is not unjust to the trustee, or to the other persons interested in the joint fund, to allow the plaintiffs to recover the sums found by the master. His methods of ascertainment are somewhat crude, but in every case the item which he allows is an item to which the plaintiff had at the time when it was contributed to the common fund a right of property, and it increased the common fund by at least the amount which he allows.

The defendant Anne Devlin, having died since the filing of the master's report, we understand that the executors of her will have now been made parties and are in court. The sums found due to the several plaintiffs from Anne Devlin by the master, are to be paid to them by her executors, with interest from the filing of the bill, and with costs to be taxed by the clerk. The other defendants are not to recover costs, nor are costs to be allowed the plaintiffs as against them.

Decree accordingly.

R. Lund & W. E. Jewell, (*C. H. Welch & H. F. Naphen* with them,) for the plaintiffs.

J. A. Maxwell & S. H. Hudson, for the defendants.

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GEORGE C. MORRELL *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. November 16, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Arbitrators — Award — Return into Court.

An award of arbitrators enclosed in a sealed envelope and sent by mail addressed to "Joseph A. Willard, Esq., Clerk Superior Court, 3 Court House, Boston," is transmitted to the court within the meaning of the Pub. Sts. c. 188, § 8.

It is not required by the Pub. Sts. c. 188, § 8, that, when an award is "enclosed and sealed by the arbitrators and transmitted to the court," the envelope shall have on it any writing declaring the nature of the contents of the envelope, although it is a common and convenient practice to write on it the title of the case, and a short general description of what is enclosed.

MOTION by the Old Colony Railroad Company, to the Superior Court, for the acceptance of the award of arbitrators under the Pub. Sts. c. 188. The plaintiff objected that the court had no jurisdiction of the award, because the same had not been properly reported or transmitted to the court within the time required by law. Hearing before *Dunbar*, J., who overruled the objection, allowed the motion, and accepted and confirmed the award; and the plaintiff alleged exceptions. The facts appear in the opinion.

W. D. Turner, for the plaintiff.

J. H. Benton, Jr., for the defendant, was not called upon.

FIELD, C. J. Section 8 of Pub. Sts. c. 188, is as follows: "The award shall be delivered by one of the arbitrators to the court designated in the agreement, or shall be enclosed and sealed by the arbitrators and transmitted to the court, and shall remain sealed until opened by the clerk." In *James* v. *Southern Lumber Co.* 153 Mass. 361, 364, the court say, "We are of opinion that, since the St. of 1885, c. 384, took effect, an award may be returned to the Superior Court at any time within the time fixed by the submission, whether the court is holding a regular sitting or not, and that if the arbitrators make the award, and enclose it in an envelope, and seal it, and deliver it to the clerk

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of the court addressed to the court, this is transmitting and returning it to the court within the meaning of the statute. See Pub. Sts. c. 159, §§ 16, 25." In that case, the award was sent by the arbitrators to the clerk's office in a sealed envelope addressed to the court, with an indorsement in writing that the envelope contained an award in a case entitled by the names of the parties.

In the present case, the arbitrators enclosed the award in a sealed envelope, and sent it by mail addressed to "Joseph A. Willard, Esq., Clerk Superior Court, 3 Court House, Boston," and it was received by him on October 7, 1891, and he wrote upon the envelope, "Rec'd. 7 Oct. 1891." There was no other writing on the envelope. The question is whether transmitting it to the clerk of the court is transmitting it to the court within the meaning of Pub. Sts. c. 188, § 8. We think that it appears from the exceptions that the envelope was transmitted to and received by the clerk of the court at his office in his official capacity as clerk, and that, as he is the proper custodian of the award when returned to the court, the transmission of the award to him as clerk at his office is a transmission to the court of which he is the clerk. The court, in subsequently ordering the envelope to be opened, treated it as transmitted to the court. The statute does not require that, when an award is "enclosed and sealed by the arbitrators and transmitted to the court," the envelope shall have on it any writing declaring the nature of the contents of the envelope, although it is a common and convenient practice to write on it the title of the case, and a short general description of what is enclosed.

Exceptions overruled.

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CHARLES MOORE & another *vs.* ERIC A. ERICKSON.

Middlesex. November 16, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mechanic's Lien — Entire Contract for Labor and Materials — Lien on Land for Labor.

B. made a written contract with C. to furnish labor and materials for the construction of a house on B.'s land. A. made an oral contract with C. to furnish all the labor and materials in plumbing the house for an entire sum. Shortly after A. commenced work C. failed, and A. and C. mutually rescinded their contract. A. offered to complete the contract at the expense of B., but B. refused. No notice in writing was given by A. to B., according to the Pub. Sts. c. 191, § 3. *Held*, that, as the labor was performed and furnished under an entire contract for an entire price, and as A. had not lost his right to recover against C. by reason of the failure to complete the contract, and as this labor had been a benefit to B. and as the Pub. Sts. c. 191, § 2, permit the labor to be separated from the materials for the purpose of enforcing a lien, A. might enforce a lien against B.'s land for what the labor was reasonably worth, not exceeding the entire price agreed upon in the contract after deducting any damages suffered by B. from the non-completion of the contract.

PETITION under Pub. Sts. c. 191, to enforce a mechanic's lien. The case was submitted to the Superior Court, and, after judgment for the respondent, to this court, on appeal, on agreed facts, the material portions of which are stated in the opinion.

W. B. Durant, (*J. E. Farnham* with him,) for the petitioners.

W. B. French, for the respondent.

FIELD, C. J. The agreed facts show that the petitioners would have been entitled to enforce a lien for the labor performed under their entire contract with McArthur, pursuant to Pub. Sts. c. 191, § 2, if they had completed the contract. The only question is whether they have lost the lien by not completing the contract under the circumstances stated. It appears that McArthur, who, as contractor with the respondent, made the contract with the petitioners, failed, and told them that he could not pay them, and that they must look "to their lien on the house for their pay," whereupon the petitioners and McArthur "mutually rescinded their contract." At this time the petitioners "had not put in two hot-water boilers and several faucets, and some other minor materials, which, under their

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contract, they were obliged to furnish," but "after the said McArthur became insolvent, and that fact being known to the respondent, the petitioners offered to complete the contract at the expense of the respondent, but the latter refused." As the contract was rescinded by the contracting parties, there could be no action on the contract, but the petitioners on the facts stated, could have maintained an action against McArthur for what the labor performed and the materials furnished by them were reasonably worth. *Fitzgerald* v. *Allen*, 128 Mass. 232. The petitioners made no contract with the respondent, but it must be taken under our decisions that their contract with McArthur was made by the consent of the respondent, within the meaning of Pub. Sts. c. 191, § 1.

No lien could attach for the materials furnished by the petitioners, because they gave no notice in writing in accordance with the provisions of Pub. Sts. c. 191, § 3; but the second section permits a lien for the labor, provided that "in no case shall such lien be enforced for a sum greater than the price agreed upon for the entire contract." This last mentioned section makes an entire contract for labor and materials separable for the purpose of enforcing a lien against the owner of the land for the labor. It is applicable only to labor performed or furnished under an entire contract for an entire price, but it is not required in this section that the contract shall be completely performed. If the petitioners have been prevented from performing the contract by the other party to it, without fault on their part, they do not lose their right of action against that party; and we think that it was not the intention of the statute that they should lose their lien on the land for the labor. The respondent is protected if the petitioners cannot recover in any event against the land more than the entire contract price, after deducting from that price all damages suffered by him by reason of their failure to complete the contract. *Gogin* v. *Walsh*, 124 Mass. 516, was decided on the ground that the statement of account which was filed was not in accordance with St. 1872, c. 318, § 2. *Smith* v. *Norris*, 120 Mass. 58, closely resembles the case at bar, although the contract was for labor only, and whether Pub. Sts. c. 191, § 2, apply to such a contract or not, the same rule should apply to the labor per-

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formed or furnished under an entire contract for labor and materials, as to labor performed or furnished under an entire contract for labor only. See also *McCue* v. *Whitwell*, 156 Mass. 205.

We are therefore of opinion that, as the labor was performed and furnished under an entire contract for an entire price, and as the petitioners have not lost their right to recover against McArthur by reason of their failure to complete their contract, and as this labor has been a benefit to the respondent, and as the statute permits the labor to be separated from the materials for the purpose of enforcing a lien, the petitioners may enforce a lien against the respondent's land for what the labor was reasonably worth, not exceeding the entire price agreed upon in the contract, after deducting from that price any damages suffered by the respondent from the non-completion of the contract. The statement of account filed in the registry of deeds shows the number of days of labor performed or furnished, and the price per day, and the amount claimed is in all sixty-six dollars, and it is agreed that the account is correct, and that the prices are fair and reasonable. It appears also in the agreed facts that "the petitioners furnished materials for said house to the amount of one hundred and fifty dollars, according to contract, and have not been paid anything on account of said contract." The entire contract price was two hundred and seventy-five dollars. It is apparent, we think, that it was the intention of the parties that, if the petitioners are entitled to judgment, it should be for sixty-six dollars. The judgment entered for the respondent is reversed, and judgment should be entered for the petitioners for the sum of sixty-six dollars, with interest from the date of the petition.

So ordered.

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ROBERT G. S. COLLAMORE *vs.* JOHN H. COLLAMORE.

Suffolk. November 17, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Writ of Entry — Devise — Estate Tail — Mortgage — Deed — Barring Entail.

A testator to whom certain premises were conveyed in 1799, by his will, which was allowed in 1813, gave one half of his property to his only daughter M., "and her heirs born of her body forever," and the other half to his only son J. Upon a petition for partition by J. and M., the premises above mentioned were set off to M. as her share under the will. M. was twice married, and by her first husband had three sons, A., B., and C. M. and her second husband, in 1835, conveyed the premises in mortgage to a certain corporation. M. died in 1845, and by her will she gave the premises in trust for the joint benefit of her sons B. and C., who had the right to terminate the trust, and, upon request, receive a conveyance of the premises discharged of the trust. The trustee was to take the premises subject to the mortgage, which he was to pay; and the mortgage was discharged in 1865. In 1846, A., "in consideration of five dollars" paid to him by the trustee, "and for other good and valuable considerations," conveyed the premises to the trustee, "be my right, title, interest, and estate in and to the said parcels of land, . . . in whatever manner acquired, whether by devise, descent, or otherwise." The deed, which was duly recorded, also recited that the conveyance was made for the further assuring of the title of the trustee under the will of A.'s mother, and for confirming to the trustee a full and absolute estate in fee simple therein, and also for the purpose of ratifying a conveyance of the premises with other parcels which had been made by A. jointly with B. and C. to the trustee earlier in the same year. In 1874, the administrator of the estate of C., who had died, conveyed, under a license from the Probate Court, C.'s estate in the premises to B., and in the same year the trustee under M.'s will conveyed the premises discharged of the trust to B. A. died in 1884, and his oldest son, in 1890, brought a writ of entry against B. to recover the premises. *Held*, that the devise to M. in her father's will created an estate tail, and, on her death, the estate descended to A., her oldest son; that the mortgage given by M. and her husband was immaterial; that the deed of A. in 1846 barred the entail; and that the action could not be maintained.

WRIT OF ENTRY, dated January 25, 1890, to recover a parcel of land in Boston. Plea, *nul disseisin*. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows.

The evidence showed that George Makepeace, by a warranty deed dated September 27, 1799, duly acknowledged and recorded on September 28, 1799, conveyed the demanded premises to John Hoffman, who was the demandant's great-grandfather

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and the tenant's grandfather. He died in December, 1812, leaving two children, John B. Hoffman and Maria Eliza Hoffman, surviving. The will of John Hoffman, which was duly proved and allowed on January 18, 1813, provided, among other things, as follows: "After my said wife's decease, I give and bequeath to my only daughter, Maria Eliza Hoffman, and her heirs born of her body forever, one half of all the property which my said wife may leave at her decease. The other half I give and bequeath to my only son, John Butler Hoffman, and his legal heirs forever, after my wife's decease." The demanded premises were afterwards, under a petition for partition of John B. Hoffman and Maria E. Hoffman, duly set off to Maria E. as her share as devisee under said will. Maria E. was twice married. Her first husband was Gilman Collamore. The issue of that marriage was two daughters, who died during their infancy, and three sons, — Gilman, father of the demandant, John H., the tenant, and George W. Her second husband was Israel Ames. Israel Ames and Maria E. in her right, by a deed dated October 15, 1835, duly acknowledged and recorded on October 29, 1835, conveyed the demanded premises in mortgage, in consideration of $12,000, to the Massachusetts Hospital Life Insurance Company, by words of bargain and sale, with covenant of lawful seisin in fee in the grantors. The defeasance clause was, that upon the payment of $12,000 the deed was to be void. The mortgage was discharged in the margin on October 16, 1865. Maria E. died on November 15, 1845, leaving a will, which was duly proved and allowed on January 5, 1846, by the terms of which she bequeathed the demanded premises to George H. Kuhn, in trust for the joint and equal benefit of her two sons, John H. Collamore and George W. Collamore, with the right in them to revoke and terminate the trust, and upon request the premises, or any part thereof, were to be conveyed to themselves discharged of the trust. The will further provided that the trustee should take the demanded premises subject to the mortgage of $12,000, and that the trustee should pay the same, so as to hold the testatrix's husband harmless and indemnified therefrom. On January 19, 1846, Kuhn resigned the trust, and the Supreme Judicial Court, on February 2, 1846, appointed John A. Andrew trustee in place of Kuhn.

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By a deed dated February 5, 1846, Gilman Collamore, John H. Collamore, and George W. Collamore, in consideration of one dollar paid by Andrew, trustee, did "grant, remise, release, and forever quitclaim unto the said Andrew, his heirs and assigns forever, all the right, title, and interest, estate, and claim which we, or either of us, have, or might have, as heirs at law of our late honored mother, Mrs. Maria Eliza Ames, late of said Boston, deceased wife of Israel Ames of said Boston, or under the last will and testament of our grandfather, John Hoffman, late of said Boston, merchant, deceased, or in any other manner acquired save the right, title, interest, estate, and claim which we have, whether jointly or severally, under the last will and testament of our late said mother, in and to the following parcels of land, with the buildings thereon," including, among other estates, the demanded premises. This deed further referred to the fact of the resignation of Kuhn and the appointment of Andrew as trustee, and then recited as follows: "We do hereby mean and intend to convey and confirm the premises aforesaid, with the privileges and appurtenances thereunto belonging." The habendum was to Andrew as trustee, "for the purposes expressed in the will of our late mother, Maria E. Ames, above referred to." The respective wives of Gilman and George joined for the purpose of release of dower. The deed was acknowledged by all the grantors, and duly recorded on February 21, 1846.

By a second deed, dated December 12, 1846, Gilman Collamore, in consideration "of five dollars to me paid by John A. Andrew of Boston, in the county aforesaid, trustee under the will of Maria E. Ames, late of said Boston, deceased, the receipt of which is hereby acknowledged, and for other good and valuable considerations me thereto moving," by words of bargain and sale, conveyed to Andrew the demanded premises. The deed also provided as follows: "be my right, title, interest, and estate in and to the said parcels of land, and each and every part of them, in whatever manner acquired, whether by devise, descent, or otherwise. This conveyance being made for the further assuring of the title of the said Andrew as trustee under the will of my said late mother, in and by which the parcels of land aforesaid were devised in trust for the benefit of my

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brothers, John H. Collamore and George W. Collamore, and for the confirming unto the said Andrew, trustee as aforesaid, his heirs and assigns, a full and absolute estate in fee simple therein, as also for the purpose of ratifying and confirming the grant and conveyance made by me jointly with my said brothers to the said Andrew by deed dated" February 5, 1846. Lucinda C. Collamore, wife of Gilman, joined for the purpose of release of dower, and the deed was duly acknowledged and recorded on December 31, 1846. The oldest child of the demandant's father was Maria L. H. Collamore, born on December 3, 1845; and it was admitted that the demandant is the oldest son of Gilman Collamore, that the latter was the oldest son of Maria E., and that he died on July 26, 1884.

It further appeared that George Putnam, Jr., as administrator *de bonis non* of the estate of George W. Collamore, deceased, under a license from the Probate Court granted on April 13, 1874, conveyed the estate of George W. in the demanded premises to the tenant, by a deed dated May 30, 1874, duly acknowledged and recorded; and that Andrew, as trustee, conveyed the demanded premises discharged of the trust to the tenant, by a deed dated September 3, 1874. The demandant testified that the tenant had told the demandant that he had obtained the premises partly under his mother's will and partly at an auction sale on a judgment he had obtained against his brother George.

The demandant also introduced in evidence the answers of the tenant to interrogatories propounded to him in proceedings in the Probate Court, which stated, among other things, that he did not pay Gilman anything to execute the deeds of February 5 and December 12, 1846.

The judge ruled that, upon all the evidence, the jury would not be justified in returning a verdict for the demandant; and directed a verdict for the tenant. The demandant alleged exceptions.

E. B. Goodsell, for the demandant.

R. M. Morse, for the tenant, was not called upon.

FIELD, C. J. It is conceded by the counsel of the tenant that the devise of John Hoffman to his daughter, "Maria Eliza Hoffman, and her heirs born of her body forever," created an

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estate tail, and that on her death the estate descended to her oldest son, Gilman Collamore, of whom the demandant is the oldest son. *Corbin* v. *Healy*, 20 Pick. 514. Maria Eliza died on November 15, 1845. It is contended, among other things, by the counsel of the tenant, that Gilman Collamore barred the entail by his deed of December 12, 1846, to John A. Andrew, trustee. Gilman died on July 26, 1884. On the facts stated in the exceptions, it must be taken that Gilman, at the date of his deed, was actually seised of the land as tenant in tail, within the meaning of Rev. Sts. c. 59, § 3, now Pub. Sts. c. 120, § 15. *Green* v. *Chelsea*, 24 Pick. 71, 78. *Coombs* v. *Anderson*, 138 Mass. 376. The mortgage of Maria Eliza and her husband to the Massachusetts Hospital Life Insurance Company is immaterial. It does not appear that the mortgagee ever took actual possession of the land, and the mortgage was discharged on October 16, 1865. A mortgagor of land in possession, and his heirs, are actually seised of the land as against everybody but the mortgagee. *Willington* v. *Gale*, 7 Mass. 138. *Dolliver* v. *St. Joseph Ins. Co.* 128 Mass. 315. The deed of Gilman Collamore was sufficient in form to bar the entail. *Coombs* v. *Anderson*, *ubi supra*. *Exceptions overruled.*

COMMONWEALTH *vs.* JAMES ARMSTRONG.

Suffolk. November 21, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Robbery — Evidence.

If the defendant's counsel on an indictment for robbery puts in evidence the substance or effect of the charge made by the witness, a police officer, when he committed the defendant, it is competent for the Commonwealth to prove the exact words the witness used in making the charge.

INDICTMENT for robbery. At the trial in the Superior Court, before *Dunbar*, J., the defendant, after a verdict of guilty, alleged exceptions, the substance of which appears in the opinion.

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W. H. Baker, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth, was not called upon.

FIELD, C. J. The defendant's counsel asked a police officer who arrested the defendant, and who was a witness for the Commonwealth, on cross-examination, "whether the charge he made against the defendant at the station-house when he committed him was not that of drunkenness, and the witness replied that it was." "Thereupon," as the exceptions recite, "the district attorney asked the witness to state what he said in making the charge, — to state the words he used." The court admitted the question, against the objection of the defendant, who excepted. The witness replied, "I told the lieutenant to book this man for drunkenness, and told him that a man had been knocked down and robbed, and this man corresponded to the description given." The defendant's counsel, having put in evidence the substance or effect of the charge made by the witness at the station-house, it was clearly competent for the Commonwealth to prove the exact words the witness used in making the charge. *Commonwealth* v. *Keyes*, 11 Gray, 323. *Commonwealth* v. *Goddard*, 14 Gray, 402. *Farley* v. *Rodocanachi*, 100 Mass. 427. *Dole* v. *Wooldredge*, 142 Mass. 161, 184. *Exceptions overruled.*

J. M. A. BELL & another *vs.* JANE McDOWELL.

Norfolk. November 28, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Note — Married Woman — Payment of Husband's Debt — Consideration.

In an action on a promissory note payable to the order of the plaintiffs and signed by the defendant, a married woman, there was evidence that she knew that her husband had had dealings with the plaintiffs and was indebted to them, and that she delivered the note to her husband to be used by him. *Held*, that the judge, trying the case without a jury, could properly infer that she delivered the note to her husband to be given to the plaintiffs in payment of his account with them.

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CONTRACT, upon a promissory note, of which the following is a copy:

"$250\frac{68}{100}$. November 29, 1890.

"Ninety days after date I promise to pay to the order of Bell and Casey two hundred and fifty and $\frac{68}{100}$ dollars at any bank in Boston, value received. Jane McDowell."

At the trial in the Superior Court, without a jury, before *Thompson*, J., the defendant, called by the plaintiffs, admitted her signature to the note, and, in response to questions propounded to her by her own attorney, testified as follows: "Bell and Casey, or any one for them, never paid me any money or other consideration for this note. I did not know anything as to what was done with it after I signed it. I gave it to my husband, and don't know what he did with it, and had no knowledge or information of any of the circumstances of requiring the note, or giving it, other than simply signing it and delivering it to my husband."

On cross-examination she testified that she understood it was a note to Bell and Casey; that her husband was helping to manufacture iron ovens that had to be cast; and that she had no interest in the business, although at one time her husband used to sign his name as agent for her in carrying on the business.

Casey, one of the partners, testified "that Mr. McDowell brought the note in suit to their factory; that he was indebted to the firm at that time in the amount of the note; that he had had some conversation with him in regard to payment of the amount before giving the note, and that they took the note in payment from Mr. McDowell for the debt of $250.68, and gave Mr. McDowell credit on the books for that amount; that he did not advance any money to Mrs. McDowell on the note, and that the debt against the husband had entirely accrued before the note was given; and that before he took the note he never told Mrs. McDowell that he would square her husband's account for the note." He also testified that he had a talk with the defendant before the note was given about the account, but not about the note.

The defendant requested the judge to rule that there was no consideration for the note as between the plaintiffs and the defendant, and that, upon all the evidence, the plaintiffs could

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not recover. The judge refused both requests, and ordered judgment for the plaintiffs; and the defendant alleged exceptions.

S. L. Whipple, for the defendant.

J. E. Cotter, for the plaintiffs, was not called upon.

FIELD, C. J. There was evidence that the defendant signed the note, which, as she knew, was payable to the order of the plaintiffs, and that she knew that her husband had had dealings with the plaintiffs, and was indebted to them, and that she delivered the note to her husband to be used by him. From this evidence the court, trying the case without a jury, could properly infer that she delivered the note to her husband, to be given to the plaintiffs in payment *pro tanto* of his account with them. *Exceptions overruled.*

COMMONWEALTH *vs.* THOMAS M. LUCAS.

Plymouth. November 28, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Indictment for Polygamy — Copy of Record of Divorce — Identity — Cohabitation.

An indictment for polygamy, under the Pub. Sts. c. 207, §§ 4, 5, alleged that the defendant, at Portland, Maine, unlawfully married C. B. T., being the husband of M. A. B., who was alive, and from whom he had not been legally divorced. The defendant offered in evidence what purported to be a copy of the record of the Supreme Judicial Court of Maine, at a term held at Auburn on the third Tuesday of September, 1890, in a cause of divorce in which Thomas M. Lucas of Auburn, husband of Mary A. Lucas, was the libellant and Mary A. Lucas was the libellee, the libel alleging that they were married "at Brockton, in the State of Mass., May the 6th, 1876, by Rev. F. D.," and it appearing that the libellant gave notice, pursuant to the order of court, to Mary A. Lucas, who did not appear and was defaulted, and the court granted a divorce for desertion. The presiding justice rejected the copy on the ground that there was no evidence "that the defendant was the same Thomas M. Lucas named in said record." The exceptions recited that "Mary A. Lucas, formerly M. A. B.," had testified "that on the 10th day of May, in the year 1876, she was united in marriage with the defendant, whom she saw in court and identified, at Brockton, . . . by the Rev. F. D.," and that "he deserted her in the year 1881." The exceptions also recited that there was evidence "tending to show that in the month of February, A. D. 1890, and at other times, the defendant was residing in the State of Maine, and in the town of Auburn." *Held*, that the identity of the names, and the close

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resemblance of the other facts found in the record of the Maine court, and in the testimony at the trial, in the present case, afforded abundant evidence that the defendant was the same person as the libellant in the record.

The words to continue "to cohabit with such second husband or wife," as used in the Pub. Sts. c. 207, § 4, mean to continue to live or to dwell together as husband and wife ordinarily do, but, according to the weight of authority, do not necessarily imply actual sexual intercourse.

FIELD, C. J. The defendant was indicted for polygamy under Pub. Sts. c. 207, §§ 4, 5. The first part of the indictment is in substance that the defendant, at Portland in the State of Maine, unlawfully married one Carrie B. Tracy, being then the lawful husband of one Mary A. Burk, who was alive, and from whom he had not been legally divorced. The defendant offered in evidence what purported to be a copy of the record of the Supreme Judicial Court of the State of Maine, at a term held at Auburn, within the county of Androscoggin, on the third Tuesday of September, A. D. 1890, in a cause of divorce in which Thomas M. Lucas of Auburn, in said county, husband of Mary A. Lucas, was the libellant, and the said Mary A. Lucas was the libellee, in which it appears that the libel alleged that they were married "at Brockton in the State of Mass., May the 6th, 1876, by Rev. Father Doherty." It also appears therein that the libellant gave "notice of his said libel to the said Mary A. Lucas, pursuant to the order of court thereon, . . . but the said Mary A. Lucas, though solemnly called to come into court, does not appear, but makes default"; whereupon the court found that the material facts alleged in the libel had been proved to its satisfaction, and granted a divorce from the bonds of matrimony, "for the cause of utter desertion continued for more than three years, as set forth in the libel." The copy purports to be attested by the clerk of that court, but it does not appear by the exceptions whether the seal of the court was annexed, although the exceptions recite that it was duly authenticated. See Pub. Sts. c. 169, § 67. This copy was rejected by the court, on the ground that there was no evidence "that the defendant was the same Thomas M. Lucas named in said record." The exceptions recite that "Mary A. Lucas, formerly Mary A. Burk," had previously been called as a witness by the Commonwealth, and had testified, "that on the 10th day of May, in the year 1876, she was united in marriage with the defendant, whom she saw in

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court and identified, at Brockton, in said county [Plymouth], by the Reverend Father Doherty," and that "he deserted her in the year 1881." This testimony accords with the allegations contained in the record of the Maine court, except that there it is alleged that they were married on May 6, 1876, and that she deserted him on July 20, 1881. The exceptions also recite that there was evidence "tending to show that in the month of February, A. D. 1890, and at other times, the defendant was residing in the State of Maine, and in the town of Auburn." The identity of the names, and the close resemblance of the other facts found in the record of the Maine court, and in the testimony at the trial in the present case, afford abundant evidence that the defendant is the same person as the libellant in the record, and for this reason the exceptions must be sustained.

The only other exception which has been argued by the counsel for the defendant relates to his request that the court rule "that the word 'cohabit,' in the statutes of this Commonwealth relating to the crime of polygamy, means more and something different from the living or residing together of two parties in the same house; it means such a continuous living or associating together as is common and usual between husband and wife, and would warrant a jury in the belief that they had the sexual relations with each other that husband and wife ordinarily have." The court refused this request, and ruled "that the government need not prove actual sexual relations between the parties; that it would be enough if they lived together openly, and defendant held himself and said Carrie B. out as husband and wife, and that the word 'cohabit' in the statute did not necessarily imply actual sexual relations." The exceptions recite that said Carrie B. Lucas testified "that after she and the defendant came to this Commonwealth no act of sexual intercourse ever took place between her and him in said county of Plymouth."

Section 4 of Pub. Sts. c. 207, provides that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State, shall, except in the cases mentioned in the following section, be deemed guilty of polygamy," etc. The indictment in the present case not only alleges that the defendant, at Portland, in the State

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of Maine, married Carrie B. Tracy, having a former wife, Mary A. Burk, then living, but also alleges that the defendant "did cohabit and continue to cohabit with the said Carrie B. Tracy, his second wife, in this Commonwealth, to wit, at Brockton aforesaid, for a long space of time," etc. This last allegation is material, because the second marriage is alleged to have taken place in the State of Maine, and there would be no offence against the laws of this Commonwealth if the defendant had not cohabited with such "second wife in this Commonwealth." To continue "to cohabit with such second husband or wife," as the words are used in Pub. Sts. c. 207, § 4, must mean to continue to live or dwell together as husband and wife ordinarily do, but, according to the weight of authority, the words do not necessarily imply actual sexual intercourse. *Cannon* v. *United States*, 116 U. S. 55. *In re Snow*, 120 U. S. 274. *State* v. *Nadal*, 69 Iowa, 478. *Sullivan* v. *State*, 32 Ark. 187. *Bush* v. *State*, 37 Ark. 215. *Calef* v. *Calef*, 54 Maine, 365. *Commonwealth* v. *Calef*, 10 Mass. 153. *Southwick* v. *Southwick*, 97 Mass. 327. 1 Bish. Mar., Div. & Sep. § 1669 *et seq.*

Whether the evidence recited in the exceptions is sufficient to warrant the jury in finding that the defendant lived with Carrie B. Tracy as his wife is a question not before us.

Exceptions sustained.

J. M. Day & H. Kingman, for the defendant.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

JAMES B. FORD *vs.* EASTHAMPTON RUBBER THREAD COMPANY.

Hampshire. November 30, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Rescinding Vote to pay Dividend.

The doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to the promise of a corporation to pay a dividend to its stockholders.

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After a dividend has been duly declared by a vote of the directors of a corporation, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors held before the time at which the dividend becomes payable according to the vote, if the fact that the dividend has been declared has not been made public, or in any manner communicated to the stockholders, and no fund has been set apart for the payment of the dividend.

CONTRACT, for money had and received. At the trial in the Superior Court, without a jury, before *Aldrich*, J., there was evidence tending to show that the plaintiff on June 16, 1891, owned fifty-two shares of the capital stock of the defendant company, of the par value of one hundred dollars per share; that on that day the directors passed the following vote, namely, "That a dividend of 20 per cent be paid to stockholders of this date, payable Tuesday, June 23d, 1891"; that on said June 16th the annual meeting of stockholders of the company for the election of directors was held immediately after the meeting of directors, according to custom, and duly elected five directors, as provided by the by-laws of the company, two only of the old directors being re-elected, and no director being re-elected who voted for the twenty per cent dividend, though the two who were re-elected were present at the meeting when it was voted; and that on said June 16th, as soon as the stockholders' meeting adjourned, the directors elected and re-elected thereat met, qualified, organized for the year, and passed the following votes: "That the vote passed by the directors of this company this day declaring a dividend of 20 per cent on the capital stock of the company, payable Tuesday, June 23d, 1891, be reconsidered and rescinded; the same is hereby rescinded. That a dividend of six per cent, payable June 23d instant to stockholders of record this day, be declared in place of the dividend voted at earlier meeting of this board this day." It also appeared that no money was set aside or provided to pay said dividend of twenty per cent, but the company had ample means and facilities for paying the twenty per cent dividend; that always before money had been provided to pay a dividend before it was declared; that money to pay said six per cent dividend was provided after the meeting and before said 23d of June by borrowing, and the same was set aside and deposited in bank therefor; that the treasurer sent the check of the defendant on the bank where the money was deposited to each stockholder of record of said June 16th to pay

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the dividend on his stock at six per cent, including the plaintiff, on said 23d June, 1891; and that the plaintiff declined to accept the check, and returned the money to the treasurer. It further appeared in evidence that no stockholder of the defendant had been paid the twenty per cent dividend for June, 1891; that a majority of the stockholders had accepted the dividend of six per cent paid by checks as aforesaid on June 23, 1891, in full; that the plaintiff, by his attorney, by letter of June 30, 1891, demanded payment of the twenty per cent dividend from the defendant; and that the plaintiff made no objection to the check of the defendant sent him to pay the dividend of June 16, 1891, except that it was for a dividend of six per cent, instead of twenty per cent.

The defendant asked the court to rule that the directors elected on June 16 had a right on that day to rescind the vote whereby the twenty per cent dividend was declared payable at a future day; and that the plaintiff could not recover. The judge declined so to rule, ordered judgment for the plaintiff, and reported the case for the determination of this court. If the refusal to rule and order of judgment were correct, judgment was to be affirmed; otherwise, judgment was to be ordered for the defendant.

G. M. Stearns, for the plaintiff.

W. G. Bassett, for the defendant.

FIELD, C. J. It seems to be settled that, when a dividend has been fully declared, the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it, if it is not paid on demand. In some cases money or other property equal to the whole amount of the dividend declared has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the *cestuis que trust* of this fund, each entitled to his share. In other cases, the corporation has credited

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the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders; or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all alike. See *Beers* v. *Bridgeport Spring Co.* 42 Conn. 17; *State* v. *Baltimore & Ohio Railroad*, 6 Gill, 363; *King* v. *Paterson & Hudson River Railroad*, 5 Dutch. 504; *Jermain* v. *Lake Shore & Michigan Southern Railway*, 91 N.Y. 483; *Hopper* v. *Sage*, 112 N.Y. 530; *Jackson* v. *Newark Plankroad Co.* 2 Vroom, 277; *Wheeler* v. *Northwestern Sleigh Co.* 39 Fed. Rep. 347. When a dividend has been declared payable at a definite future time, but no fund has been set apart for the payment of the dividend, and the corporation meanwhile becomes insolvent, whether the stockholders to the extent of their proportions of the dividend should share ratably with the creditors of the corporation in its property has not, so far as we know, been recently considered, but the decision in *Lowene* v. *American Ins. Co.* 6 Paige, 482, is that they should. The setting apart of a fund to pay a dividend has been held to give a lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation. *In re Le Blanc*, 14 Hun, 8, and 75 N. Y. 598. *Le Roy* v. *Globe Ins. Co.* 2 Edw. Ch. 657. The English Companies' Act, 1862, (25 & 26 Vict. c. 89, § 38, cl. 7,) provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves." Upon these questions, however, we desire to express no opinion.

It has been argued that there is no consideration for the promise of a corporation to pay a dividend to its stockholders, but we think that the doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to such promise. It is the object of a private business corporation to make money for its stock-

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holders, and, under our laws, it is ordinarily the duty of the directors from time to time to declare dividends out of the net earnings, if there are any, and it must be left largely to the discretion of the directors to determine when and for how much such dividends should be declared. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a general sense, the managers; and when a dividend is declared by the directors, the declaration is a determination by a body authorized to make it that the amount of the dividend should be taken from the property of the corporation and paid over to the stockholders. The cause of action of each stockholder against the corporation for non-payment of the dividend does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization, and the relation of the stockholders to the corporation and its property. Unless the rights of creditors intervene, or the corporation is enjoined from paying the dividend, on the ground that the dividend has not been earned, or on some other ground, the amount of the dividend, after it has been declared and has become payable, is considered as property held by the corporation for the use of the stockholders individually, and the stockholders may recover their shares as money or property had and received to their use. We have been able to find little or no authority on the precise question involved in this case, namely, whether, after a dividend has been duly declared by a vote of the directors, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors, held before the time at which the dividend becomes payable according to the vote, when the fact that a dividend has been declared has not been made public, or in any manner communicated to the stockholders, and when no fund has been set apart for the payment of the dividend. On principle, we do not see why the directors may not rescind such a vote, under the circumstances stated. By the vote no specific property passed to the stockholders. If the vote be regarded as a declaration of trust in favor of the stockholders, it could be revoked before it was communicated to them or any property was identified and set aside for them. Indeed, cases may easily be supposed of such a change in the affairs of a corporation, between the time when a

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dividend is declared and the time when it becomes payable, as to make the exercise of such a power by the directors useful, if not necessary, for the successful continuance of the business of the corporation. It appears in the present case that the meeting of the new directors at which the vote was rescinded was held after the annual meeting of the stockholders, but on the same day as the meeting of the directors at which the vote was passed, which was held just before the meeting of the stockholders; and that at the meeting of the stockholders "the president did not, as had for many years been the custom, announce that any dividend had been declared, or promulgate the same to the stockholders"; and it does not appear that any of the stockholders, except the directors, knew of the original vote, or that any of the stockholders had made any contracts, incurred any liability, or done anything relying on the vote. It also appears that no fund was distinctly set apart for the payment of the dividend before the vote was rescinded. As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on the vote, — certainly before the passage of the vote had been made public, or communicated to the stockholders, — it was within the power of the directors, at a meeting subsequent to that at which the vote was passed, to rescind it. In this action at law, we cannot supervise the exercise of this power by the directors.

Judgment for the defendant.

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BENJAMIN W. PARKER *vs.* HENRY KELLOGG, JR.

Suffolk. December 1, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Notes — Admission in Evidence of Letters of Defendant — Demand and Notice.

In an action by the holder against the payee and indorser of four promissory notes, two letters of the defendant were admitted in evidence on his cross-examination as having some tendency to contradict his testimony. One of the letters was dated on the day when the last three notes were made payable, and the other letter was dated on the day when the first note was made payable. They were both apparently written before any one of the notes was actually payable, and they indicated that the defendant had some knowledge of the business of the maker of the notes, and was giving attention to his means of paying them, and that the defendant meant to see to it that the maker paid them if he had the means. *Held*, that the court could not say, on the statement in the exceptions, that it appeared that the judge erred in admitting the letters, or in the instructions given to the jury with reference to the effect of the letters upon the conduct of the plaintiff, in connection with other facts known to him and appearing in the evidence, which evidence was not set out in the exceptions.

If the holder of a promissory note makes a demand upon the maker personally at the indorser's office during business hours of the last day of grace, and produces the note, and the maker says that he is unable to pay it, and makes no objection to the place of the demand, it is sufficient to hold the indorser.

CONTRACT, upon four promissory notes, one for $1,000, dated August 7, 1885, and due October 2, 1885; one for $550, dated September 8, 1885; and two for $200 each, dated respectively September 19 and September 26, 1885; the last three notes being due October 1, 1885. At the trial in the Superior Court, before *Dewey*, J., it appeared in evidence that the notes were all made by one Patrick Hart, and indorsed before delivery by the defendant. October 1, 1885, was Thursday.

The defendant contended that no demand for payment of the notes was made upon the maker thereof when the same came due, or at any other time up to the bringing of suits thereon, and that no notice was given to the indorser within a reasonable time of the non-payment of the notes. The plaintiff and his clerk, one Hogg, both testified that they demanded payment of the three smaller notes of Hart at the office of the defendant, on

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the 3d of October, between eleven in the morning and one o'clock P. M., and of the $1,000 note on the 5th of October, at the defendant's office, between ten and one o'clock; and that the notes were produced on both occasions, and shown to Hart and the defendant, who were both present, and payment demanded of Hart by the plaintiff, and that, after Hart had said he was unable to pay them, the plaintiff and Hogg both turned to the defendant and said that Hart would not pay the notes, and they must look to the defendant. The plaintiff's clerk, Hogg, testified that Hart had no place of business of his own; that he always looked for Hart at Kellogg's office between ten o'clock A. M. and one P. M., that for some time prior to October 1, 1885, and at that time, he repeatedly found Hart there at those hours; and that Hart was in the habit of going there at such hours, and used a desk there, but the witness could not say who owned the desk. Hart testified that he had no place of business anywhere, and there was no evidence that he had any save that relating to Kellogg's office. Hart at the time lived on Dorchester Avenue, Boston, at the address stated on the bottom of some of the notes. The defendant and Hart both testified that no demand was made upon Hart by either said Parker or said Hogg at the time and place aforesaid, or at any other time; and the defendant, on direct examination, testified that no notice was given him of the non-payment of the notes by said Parker or Hogg at any time, and that his first knowledge of the non-payment of the notes was about the middle of October, when he heard from Hart that the notes had not been paid.

In the cross-examination of the defendant the plaintiff's counsel offered, as tending to show that said Kellogg did know that the notes were not paid, a letter which purported to have been written by the defendant, bearing the date of October 2, 1885, addressed to the plaintiff, of which the following is a copy:

"Boston, Oct. 2, 1885. Assignment of Benjamin W. Parker from Sept. 1 to Oct. 1, 1885, is under any other assignment of any nature. The trustees will be settled to-day it is expected without question, and the money drawn to-day or early to-morrow A. M. H. Kellogg, Jr."

The plaintiff offered another letter from the defendant to the plaintiff, of which the following is a copy:

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"Boston, Oct. 1, 1885. Ben: Mr. Hart says to be ready at 12 to-morrow, as he has got a sale of some property to-day at home and will not be in until then. I will call then. Hastily, H. Kellogg, Jr."

The defendant objected to both of these letters, but they were admitted in evidence. The defendant admitted writing and signing both letters before they were offered in evidence. In instructing the jury in regard to the issue of demand and notice, the judge said, in substance, that the plaintiff contended that the receipt of the letters, in connection with other facts known to him and appearing in the evidence, awakened a feeling of insecurity in his mind, and led him to be careful in regard to making demand and giving notice on the notes, and that if the jury thought the letters under the circumstances in which they were received were calculated to have such effect, they could consider them; the bearing, reference, and effect of the letters being wholly for their judgment.

The judge further instructed the jury that a personal demand on Hart would be sufficient, if made on the three smaller notes due October 1, 1885, at any reasonable time and place in the city on October 3, 1885, and on the $1,000 note due October 2, 1885, if made at any reasonable time and place in the city on October 5, 1885, and that if the jury found that demand on Hart was made at Kellogg's office at the hours aforesaid, as testified to by the plaintiff and Hogg, such demand would be sufficient, and that no demand at Hart's residence was necessary. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. Ranney, for the plaintiff.

J. F. Simmons & H. H. Pratt, for the defendant.

FIELD, C. J. The letters of the defendant to the plaintiff admitted in evidence are almost unintelligible when taken in connection with the meagre statement of facts contained in the bill of exceptions. One of the letters is dated on the day when the last three notes declared on were made payable, and the other letter is dated on the day when the first note was made payable. As days of grace are to be allowed on all the notes, the letters were apparently written before any one of the notes was actually payable; but the letters indicate that the defendant

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had some knowledge of the business of Hart, the maker of the notes, and was giving attention to his means of paying them, and that the defendant meant to see to it that Hart paid them, if he had the means. They were admitted on the cross-examination of the defendant, and had perhaps some tendency to contradict his testimony. We certainly cannot say, on the statement of the case contained in the exceptions, that it appears that the court erred in admitting the letters, or in the instructions given to the jury with reference to the effect of the letters upon the conduct of the plaintiff, "in connection with other facts known to him and appearing in the evidence," which evidence is not set out in the exceptions.

The first note was made payable on October 2, 1885, and, allowing days of grace, was actually payable on October 5th. The last three notes, called the "smaller notes," were made payable on October 1, 1885, and allowing days of grace, were actually payable on October 3, October 4th being Sunday. Pub. Sts. c. 77, §§ 8, 9. The exceptions recite that "the plaintiff and his clerk, one Hogg, both testified that they demanded payment of the three smaller notes of said Hart at the office of said defendant on the third day of October, between eleven and one o'clock in the morning, and of the $1,000 note on the fifth day of October, at said defendant's office, between ten and one o'clock; and that the notes were produced on both occasions, and shown to Hart and the defendant, who were both present, and payment demanded of Hart by the plaintiff; and that, after Hart had said he was unable to pay them, the plaintiff and Hogg both turned to the defendant, and said that Hart would not pay the notes, and they must look to the defendant. . . . Said defendant and Hart both testified that no demand was made upon Hart by either said Parker or said Hogg at the time and place aforesaid, or at any other time." There was evidence that Hart had no place of business of his own, but that he was in the habit of going to the defendant's office, and of using a desk there. The defendant testified "that no notice was given him of the non-payment of the notes by said Parker or Hogg at any time, and that his first knowledge of the non-payment of said notes was about the middle of October, when he heard from Hart that said notes had not been paid." The only evi-

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dence, therefore, of due demand and notice was the testimony of the plaintiff and Hogg as to what took place at the defendant's office. In this state of the evidence, the court instructed the jury that, if they "found that demand on Hart was made at Kellogg's office at the hours aforesaid, as testified to by the plaintiff and Hogg, such demand would be sufficient, and that no demand at Hart's residence was necessary." Whether the defendant's office was Hart's place of business or not, if the plaintiff made a demand upon Hart personally at this office during business hours of the last day of grace, and produced the notes, and Hart said that he was unable to pay them, and made no objection to the place of the demand, this would be a sufficient demand, and to this effect were the instructions given by the court. *King* v. *Crowell*, 61 Maine, 244. 1 Dan. Neg. Inst. (4th ed.) § 638. *Exceptions overruled.*

DANIEL L. ROBERTSON & another *vs.* ELIZABETH B. ROWELL & another.

Middlesex. December 5, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Notes — Written Agreement — Indorsement of Married Woman — Consideration.

On a bill in equity brought against a married woman on three promissory notes signed by her husband, payable to her order, and bearing her name upon the back under the words, "I hereby charge my separate estate with the amount of this note," it appeared in evidence that a written agreement was made between the plaintiff and the husband of the defendant referring to the notes, and providing that, if paid to the plaintiff, they should be a settlement in full of all claims between the parties to date; but if any of them should not be paid, the account should stand as stated in the plaintiff's ledger. A week or two after the agreement and notes were signed by the husband and left with the plaintiff, the husband brought his wife to the office of the plaintiff, and she put her name on the back of each of the notes under the words referred to. The plaintiff was away, but had left the papers with his bookkeeper. The notes were used by the plaintiff according to the terms of the written contract. *Held*, that evidence of an original oral agreement that the defendant was to lend her credit to her husband was competent evidence in connection with the other facts to show that the papers when left with the plaintiff were not delivered, but merely left to await completion; that the case was one of an accommodation indorsement, that the

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words written over the signature of the defendant had no tendency to show the nature of her obligation, and that, if she made any kind of a contract, her separate estate would be chargeable for the performance of her undertaking as well without these words as with them.

The cases which hold that knowledge of the consideration by one putting his name on a note for the accommodation of another is necessary to bind him, are where a note had previously taken effect as a contract, and a new and independent consideration is required for the new contract.

BILL IN EQUITY, seeking to hold Elizabeth B. Rowell, a married woman, upon three promissory notes signed by her husband, payable to her order, and bearing her name upon the back under the words, "I hereby charge my separate estate with the amount of this note," and to reach and apply in payment thereof the income of a trust fund held for her benefit.

Hearing before *Allen*, J., who ordered a decree for the defendant, dismissing the bill upon the ground that there was no consideration for the undertaking of the defendant Rowell, and reported the case for the consideration of the full court.

E. I. Smith, (*C. M. Ludden* with him,) for the plaintiffs.

W. H. Powers, (*N. Currier* with him,) for the defendants.

KNOWLTON, J. The only question reserved by this report is whether the bill should be dismissed on the ground that the notes, as against the defendant Elizabeth B. Rowell, were without consideration. A written agreement was made between the plaintiff Robertson and William B. Rowell, the husband of the female defendant, referring to the notes set out in the bill, and providing that, if paid to the said Robertson, they should be a settlement in full of all claims between the parties up to that date; but if any of them should not be paid, the account should stand as stated in the ledger of Robertson. The notes were signed by William B. Rowell, and made payable to the order of Elizabeth B. Rowell, and on the back of each were written the words, "I hereby charge my separate estate with the amount of this note." The agreement and all the notes were signed by William B. Rowell, and were left with Robertson. A week or two afterwards Mr. Rowell brought his wife into the city, and she went with him to the office of Robertson and put her name on the back of each of the notes under the words written there. Robertson was away, but had left the papers with his bookkeeper.

It is evident from the form of the notes, and from the written

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agreement, that they were left incomplete, and were not designed to be held as contracts until signed by Mrs. Rowell. They were payable to her order, and were to be indorsed by her before they would be in a condition to be used by Robertson. We do not understand the court to find that the papers were delivered as binding contracts when they were left with Robertson, but merely left with him to be held for completion by the signature of Mrs. Rowell, and for future delivery. It is apparent that the transaction was inchoate until the notes were signed by her and the papers subsequently delivered to take effect as contracts. It is also manifest that she intended to lend her credit to her husband. It is found that it was a part of the original agreement that she should do so. That there was such an oral agreement is competent evidence, in connection with the other facts, to show that the papers, when left with Robertson, were not delivered, but merely left to await completion. When completed, they were to be used by him according to the terms of the written contract, and they were in fact so used. It was a common case of an accommodation indorsement. The words written over the signature of Mrs. Rowell had no tendency to show the nature of her obligation. They were entirely consistent with any kind of an obligation, and as consistent with one as another. Without them, her signature constituted an ordinary indorsement; with them, it was neither less nor more. If she made any kind of a contract, her separate estate would be chargeable for the performance of her undertaking as well without these words as with them. Pub. Sts. c. 147, § 2.

The case differs from *Tuttle* v. *Bartholomew*, 12 Met. 452, and *Belcher* v. *Smith*, 7 Cush. 482, in which the signature on the back of the note was appended to the special and peculiar contract of guaranty.

If there was a sufficient consideration for the notes between Robertson and her husband, she was bound, for she signed before the notes were used, knowing that her husband was to use them. There was a valuable consideration moving from Robertson in his implied promise contained in the writing not to sue on the account until the maturity of the first note, nor afterwards if the notes were paid when due. It was immaterial whether she knew the nature of the consideration or not. It

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was enough that she gave her husband the use of her name and credit in his transaction with a third person. *Chicopee Bank* v. *Chapin*, 8 Met. 40. *Stoddard* v. *Kimball*, 4 Cush. 604, and 6 Cush. 469. *Hilton* v. *Smith*, 5 Gray, 400.

The cases which hold that knowledge of the consideration by one putting his name on a note for the accommodation of another is necessary to bind him, are where a note had previously taken effect as a contract, and a new and independent consideration is required for the new contract. *Ellis* v. *Clark*, 110 Mass. 389. *Pratt* v. *Hedden*, 121 Mass. 116. *Rogers* v. *Union Stone Co.* 130 Mass. 581. In such cases, the new contract being between the holder of the note and a new party, if the consideration moves from the holder it must be known to the signer, or there is no mutuality, and it is not a consideration between the parties to the contract.

We are of opinion that, on the facts reported, there was a good consideration for the promise of the female defendant, and the case must stand for a further hearing. *So ordered.*

CHARLES HOPKINS *vs.* GEORGE S. McCRILLIS & another.

Suffolk. December 8, 1892. — January 6, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mortgage of Personal Property — Lien — Sale — Exceptions to Master's Report — Waiver.

A. mortgaged to B. two separate lots of personal property. B having foreclosed on the first lot, A brought a bill in equity against B., praying for an injunction restraining him from selling the remaining property, for an account, and for a decree that, on the payment by A. to B. of the amount due, A. should hold the property discharged of the mortgage. The case was referred to a master, who found that A. surrendered to B. the first lot of property, and authorized him to sell the same at retail and apply the net proceeds on the debt until the property should be disposed of on foreclosure sale; that B. took possession and sold, A. exercising superintendence; that later B. gave A. written notice of a foreclosure sale, duly advertised the same, and then sold by public auction, obtaining a fair price, but not enough to pay the mortgage; that B. did not include in this sale any of the second lot of property, because A. so requested and agreed to provide for the payment of the balance due; that still later, A. paying B. no part of the balance

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due and B. never having taken possession of the second lot, B. gave A written notice of a foreclosure sale of the same; that, while B. was in possession of the first lot, B. at A.'s request paid from the proceeds of the retail sales the overdue rent of A.'s store; and that, while so selling, B. at A.'s request purchased certain articles that could not be filled from the stock in the store and the result was beneficial to A. The master further found that an account annexed to B.'s answer was correct, except that interest should be computed from the day when the first foreclosure sale was completed; that the payments stated in the account were for expenditures necessarily incurred by B with the consent of A., that B. had never waived his right to continue to hold the second lot under the mortgage, or to sell the same under the power of sale; that A. had waived all informalities of B and all right to take advantage thereof; and that there was due B. a certain amount with interest. A. filed exceptions to the master's report, which put his case on the theory that the partial sale exhausted the power and released the remaining property. *Held*, that there was no occasion to consider this question, as it was not raised in the bill; and even if the power was exhausted, the lien of the mortgage was not thereby defeated, and might be enforced as though no power of sale had been inserted. *Held, also*, that A. could not repudiate transactions entered into solely for his benefit and at his request, all the items to which he objected being legitimate results of such transactions, and that the finding as to waiver was pertinent, and supported by the facts found.

BILL IN EQUITY, filed January 27, 1891, by the mortgagor of personal property against the mortgagees. The prayer was for an injunction restraining the defendants from selling the property pursuant to a notice given by the defendants to the plaintiff, for an account of what, if anything, was due to the defendants, of what had been received by them, and of the expenses chargeable to the plaintiff, and for a decree that on payment by the plaintiff to the defendants of the amount due the plaintiff should hold the property discharged of the mortgage. The case was referred to a master, who reported as follows.

The plaintiff gave the defendants, on August 21, 1890, a mortgage for $1,700, with interest at six per cent, as represented by two promissory notes of the plaintiff to the defendants, each dated January 1, 1886, one being for $700 on six months, on which $50.03 interest had accrued on August 21, 1890, the other for $1,000 on twelve months, on which interest had been paid to July 1, 1890, then overdue, and on which $1,700 as principal was the balance unpaid. This mortgage was upon two separate lots of personal property; viz. a stock of furniture and fixtures in the store No. 39 Cornhill, in Boston, occupied by the plaintiff, and a lot of household furniture in the plaintiff's residence at Medford. The mortgage and the schedule annexed thereto

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enumerated the several articles in each lot. The debt secured by the mortgage was for cash loaned by the defendants to the plaintiff some six years prior to the mortgage, and was originally a larger sum, and the plaintiff had previously given the defendants from time to time, as his stock of goods changed, a mortgage upon said stock to secure the amount due, and some of these prior mortgages had included the lease of the store to the plaintiff. Several of these prior mortgages have not been discharged, and are the ones referred to in the mortgage; but all the mortgages were given to secure one and the same debt, each mortgage containing a provision that the plaintiff could sell in the usual course of trade such portion of the stock as was required, he, the plaintiff, agreeing to replace the same with goods of the same kind and value.

On September 16, 1890, the plaintiff became embarrassed financially, and executed an agreement whereby he surrendered to the defendants, for default in the condition of the mortgage, the mortgaged property, and authorized them to sell the same at retail, and apply the net proceeds to the payment of the debts secured by said mortgages, until such time as the property should be disposed of on a foreclosure sale. This agreement was fairly entered into, and the parties agreed that the defendants should continue the plaintiff's business in his store until a sale at auction under foreclosure proceedings could be had, it being deemed for the best interest of all parties that as much of the stock should be sold at retail as possible. Although this agreement spoke of the property to be thus sold "as the mortgaged property," yet it was construed by the parties as applying only to the stock of goods in the store, not to the household furniture, each party hoping that enough could be realized from the sale to pay the whole debt. The defendants took possession of the store, and employed the clerk and bookkeeper theretofore employed by the plaintiff to take charge of the business, one of the defendants exercising a general superintendence. The plaintiff was present and fully advised of all these acts of the defendants, and assented thereto and approved thereof; and the defendants conducted the business properly, and with due regard to the plaintiff's interests, and obtained better prices for the goods sold than would have

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been otherwise obtained. On September 30, 1890, the defendants gave the plaintiff written notice that the mortgage would be foreclosed, as provided therein, "by sale of the property therein described at public auction at No. 39 Cornhill, Boston, Mass., on Saturday, October 11, 1890, at 10 o'clock A. M." The defendants thereupon proceeded to prepare the goods in the store for such auction sale, continuing meanwhile to sell at retail, and also advertised the proposed sale of the stock of goods in the store only, and at the time and place so announced the defendants sold the stock by auction, and obtained therefor a fair price, but not enough to pay the mortgage. This sale was completed, and the proceeds collected, October 13, 1890. The defendants did all the above with due regard for the plaintiff's interest, and at his request.

The defendants did not include in this sale any of the furniture, because the plaintiff so requested, and agreed to provide in some way for the payment of any balance that might remain due on the mortgage debt, and so avoid a sale of the furniture; and on several occasions after the sale, and with a full knowledge of the facts, the plaintiff repeated to the defendants these requests and assurances, but has paid the defendants no part of such balance due.

The defendants never took actual possession of the furniture, and on January 15, 1891, they gave the plaintiff written notice that the mortgage would be foreclosed, as provided therein, "by sale of the property therein described, not heretofore disposed of, at public auction, at your residence in said Medford, on Thursday, the twenty-ninth day of January, A. D. 1891, at 2 o'clock P. M."

On October 11, 1890, while the defendants were in possession of the store, selling the goods at retail, the rent for the month of September, 1890, amounting to $139.58, became due, and the landlord threatened to evict unless it was paid. The plaintiff had a lease of the store, and was desirous of saving the lease to enable him to resume business upon a settlement of his liabilities, and requested the defendants to pay this rent, and they did so, and collected $25 as rent from an under-tenant of the plaintiff's. This payment of rent was made from the proceeds of the retail sales, and the plaintiff made no objections

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thereto, though he knew, or must have inferred, that such proceeds were thus applied. While the defendants were thus selling at retail, some orders could not be filled from the stock in the store, and the defendants were obliged to purchase articles to fill these orders. They did this with the plaintiff's consent and at his request, and it resulted to the benefit of the plaintiff.

The master found that the account annexed to the defendant's answer was correct and fairly stated, except that the second item thereof, being for interest upon the mortgage debt, was computed to the date of the answer, and should be revised by computing the interest to October 13, 1890. The master stated the account as follows:

Charles Hopkins to McCrillis and Kendall, Dr.

Item 1.	To cash (two notes on demand)	$1,700.00	
2.	To interest to Oct. 13, 1890 . .	66.03	
3.	To cash furnished by G. S. McCrillis & Co.	18.55	
	Total		$1,784.58
	Cr.		
Item 5.	By cash received for goods sold at private sale from Sept. 16 to Oct. 11, 1890	$974.50	
6.	By cash for goods sold at auction	900.30	
7.	By rent collected of Pettengill .	25.00	
8.	Total receipts		$1,899.80
9.	Paid rent of store, 39 Cornhill .	$139.58	
10.	Paid J. F. Huntington, clerk .	75.00	
11.	Paid Parker, paper, twine, and charges	98.95	
12.	Paid for merchandise purchased	103.95	
13.	Paid auctioneer	25.00	
14.	Paid G. S. McCrillis, services .	25.00	
15.	Paid advertising	7.00	
16.	Paid attorney's charges . . .	10.00	
17.	Total charges		$484.48
18.	Net amount applicable to payment of debt		$1,415.32
19.	Balance due on said mortgage debt . .		$369.26

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The master further found as follows: "I find that each of the payments therein stated, as paid by the defendants, is for expenditures necessarily and properly incurred by the defendants at reasonable prices, and incurred with the knowledge and consent of the plaintiff. I further find that the defendants have never waived their right to continue to hold the household furniture under their mortgage, or their right to sell the same under the power of sale contained in the mortgage, and neither the plaintiff nor the defendants ever intended to waive such rights, and the defendants forbore to sell the same at the plaintiff's request, and his implied assurance that they should not lose any rights by such forbearance; and further, that the plaintiff has waived, but not in express terms, all informalities of the defendants, and all right to take advantage thereof, and that the defendants throughout have been considerate of the plaintiff's interests and rights, and their conduct has resulted to his benefit. I find the amount due the defendants from the plaintiff, the sum of three hundred and sixty-nine and twenty-six hundredths dollars, as stated in said account, with interest to be computed thereon at six per cent from October 13, 1890, to the date of final decree."

The plaintiff excepted to the master's report for the following reasons: that in the second item of the account the interest was not correctly computed, because no interest should be allowed prior to the date of mortgage; that the third item of the account was a charge against the plaintiff not covered by the mortgage; that the ninth item of the account was not a proper charge against the plaintiff under the terms of the mortgage; that the twelfth item in the account was an improper charge against the plaintiff, because it related to transactions in regard to merchandise not included in nor covered by the mortgage; that in the account amounts received from the sale of mortgaged property could not be ascertained, because in the items thereof were included the proceeds of outside transactions in relation to merchandise and property not covered by the mortgage; that the fourteenth item in the account was an improper charge for personal services by one of the mortgagees; that the findings as to waiver therein were not findings of fact, and not properly determinable by the master; that the balance due from the

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plaintiff to the defendant was not correctly stated in the account, because of said improper charges against the plaintiff, and because of the mingling therein of the proceeds of sale of the mortgaged property with proceeds of sale of other merchandise so that the same were indistinguishable; that the account and the report were not correct, in that it was presumed therein that the mortgagees' proceedings to foreclose had been legal and valid, while it was found that the mortgagees had not waived any rights under prior mortgages, nor released the remnant of goods not sold in foreclosure proceedings under the present mortgage; whereas the plaintiff contended that the right to redeem, being entire, must be either foreclosed or open, and that on either theory the account as stated by the master was incorrect.

In the Superior Court, the plaintiff's exceptions to the master's report were overruled, and it was decreed that there was due from the plaintiff to the defendants "the sum of three hundred sixty-nine dollars and twenty-six cents, with interest thereon from October 13th, A. D. 1890, to the time of payment; that upon the payment by the plaintiff to the defendants of said sum due, with interest thereon as aforesaid, within thirty days from the date of this decree, the plaintiff shall hold the personal property conveyed by said mortgage which had not been sold by said defendants prior to the filing of said bill, as set forth in said bill, discharged of said mortgage, and the defendants shall execute and deliver to the plaintiff a discharge of said mortgage, but that upon failure of the plaintiff to pay to the defendants said sum due and interest thereon as aforesaid within said time, said bill shall be dismissed with costs to the defendants."

The plaintiff appealed to this court.

W. O. Kyle, for the plaintiff.

J. F. Wiggin, for the defendants, was not called upon.

BARKER, J. The bill is drawn upon the theory that the mortgage, notwithstanding the partial foreclosure sale, is still a lien upon so much of the mortgaged property as remains unsold. But in his exceptions to the master's report, the plaintiff attempts to put his case upon the theory that the partial sale exhausted the power, and released the remaining property. There is no occasion to consider whether the sale exhausted

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the power, as that question is not raised in the bill; and if the power is exhausted, which we do not intimate, the lien of the mortgage is not thereby defeated, and may be enforced as though no power of sale had been inserted. The contention that the partial sales are void, and that the account should be stated without reference to them, is absurd. None of the exceptions to the master's report have any foundation. The plaintiff is not to be allowed to repudiate transactions entered into solely for his benefit and at his request, and all the items to which he objects are legitimate results of such transactions.

The finding as to waiver is pertinent, and supported by the facts found.

The result is that the exceptions to the master's report are overruled, and the decree of the Superior Court is affirmed, such modifications to be made in that court as the lapse of time may require.

Exceptions to master's report overruled, and decree affirmed.

FREDERIC CUNNINGHAM & others *vs.* BOARD OF RAILROAD COMMISSIONERS.

Suffolk. November 17, 1892. — January 7, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Certiorari — Board of Railroad Commissioners — Relocation and Union of Railroad Stations — Statute.

Two railroad stations can be relocated at the same point in one proceeding under the provisions of the Pub. Sts. c. 112, § 157, and the contention that such a change, necessarily lessening the number of stopping places, is an abandonment forbidden by the provisions of the Pub. Sts. c. 112, § 156, is unsound.

A petition was brought by residents of a town, who were legal voters and owners of real estate therein, for a writ of certiorari to quash the proceedings of the Board of Railroad Commissioners approving the proposed relocation of two stations on the line of a railroad and their union in one station. *Held*, that the petition must be dismissed, because none of the petitioners were parties to the original proceedings before the board, and none of them showed such a state of facts as would entitle them to a private remedy if the action of the board was unauthorized or illegal.

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PETITION, by Frederic Cunningham and seven other residents of Brookline and legal voters and owners of real estate therein, for a writ of certiorari to quash the proceedings of the Board of Railroad Commissioners in approving the proposed relocation of the Longwood and Chapel stations on the line of the Boston and Albany Railroad Company in Brookline, and their union in one station.

The case, which was heard on petition and demurrer, and reserved for the consideration of the full court, by *Allen*, J., is stated in the opinion.

S. Hoar, for the respondents.

C. P. Greenough, for the petitioners.

BARKER, J. The contention that two railroad stations cannot be relocated at the same point in one proceeding under the provisions of the Pub. Sts. c. 112, § 157, because such a change, necessarily lessening the number of stopping places, is an abandonment forbidden by the provisions of the Pub. Sts. c. 112, § 156, is unsound. The sections referred to are practically identical with §§ 116 and 117 of the St. of 1874, c. 372, which was a codification, and contained the direction that its provisions, so far as they were the same as those of existing laws, should be construed as a continuation of them, and not as new enactments. St. 1874, c. 372, § 183. The laws regulating the subjects dealt with by the sections mentioned were the St. of 1865, c. 175, and the St. of 1872, c. 162, the first of which provided that no station established for five years should be abandoned without the consent of the Legislature, and the second, that, with certain exceptions, stations might be relocated with the written consent of the Board of Railroad Commissioners and of the local authorities.

Although it was apparent that not only was the public convenience involved in the abandonment of a station, but that the value of neighboring lands might be seriously affected thereby, the subject was first regulated by the St. of 1865, c. 175. Thereafter the Board of Railroad Commissioners was established, and required, whenever in its judgment a change of stations should be reasonable, to so inform the corporation and to report the matter to the Legislature. St. 1869, c. 408, § 3. See also St. 1874, c. 372, § 9; Pub. Sts. c. 112, § 16. In the year 1871 a peti-

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tion to compel the erection of a union station was referred to the railroad commissioners, whose report called the attention of the Legislature of 1872 to the fact that the petition was one of a numerous class, which should be regulated by a general law authorizing the relocation and discontinuance of railroad stations whenever demanded by a decided preponderance of public convenience and popular desire. Pub. Doc. 1872, No. 29, p. cci. This recommendation seems to have resulted in the passage of the St. of 1872, c. 162, which contained a section omitted from the codification of 1874, to the effect that it should be construed not to affect any legislative act specifically directing the construction or maintenance of any station, and not to apply to any station in regard to the location of which legal proceedings were then pending. St. 1872, c. 162, § 2. Instances of such legislative acts are the Sts. of 1866, c. 126, 1867, c. 112, and 1868, cc. 89, 348, considered by this court in *Commonwealth* v. *Eastern Railroad* and *Keene* v. *Eastern Railroad*, 103 Mass. 254, and the St. of 1871, c. 343, requiring the erection of the Union Station in Worcester. Litigation was then pending in the Supreme Court of the United States with reference to the St. of 1868, c. 348, requiring the erection of a station at a particular point in Lynn. Since the passage of the St. of 1872, c. 162, numerous stations have been relocated, but in no instance save the present has consent been sought to a relocation by which two stations would be consolidated at the same point, except under the provisions of special statutes. Such special acts are found in the Sts. of 1878, c. 118, 1884, c. 47, and 1891, c. 211. A special act authorizing the discontinuance of a station is found in the St. of 1878, c. 117, and one authorizing an abandonment and relocation at a point so remote that the change could not be made under the provisions of the general law, is to be found in the Sts. of 1891, c. 183. The provisions of the Pub. Sts. c. 112, §§ 156, 157, were considered by this court in 1884, in *Attorney General* v. *Eastern Railroad*, 137 Mass. 45.

Recurring to the state of the legislation upon the passage of the St. of 1872, c. 162, it is clear that the operation of the St. of 1865, c. 175, was so far affected by the later statute that an abandonment resulting from a relocation properly made under its provisions is not within the prohibition of the former statute.

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This conclusion flows from a consideration of the scope of each statute, the history of the St. of 1872, c. 162, and the fact that every relocation must involve an abandonment of the old stopping place. It is supported by the peculiar wording of the second section, which declares that the statute shall be construed not to affect certain legislative acts, of which the St. of 1865, c. 175, was not one. That such was its contemporary construction is shown by the fact that in the ensuing year several stations were relocated, (Pub. Doc. 1874, No. 29, p. 36,) and no litigation ensued. There is no reason why, in this particular, a different construction should be given to the sections of the codification of 1874, or of the Public Statutes regulating this subject. These re-enactments show that, when properly construed, the provisions relating to abandonment and to relocation are not in conflict. The omission from the codification of 1874 of the second section of the St. of 1872, c. 162, thus placing all stations within the operation of the section authorizing relocation, is significant of the intention of the Legislature to place the regulation of the location of all stations within the operation of general laws. The instances of special acts dealing with particular stations are of but slight significance. The expenditure of money involved in any change is so great that in any instance the special act may have been sought to compel the corporation to make the change, and special acts are too often granted for purposes which might be accomplished under general laws, to justify an inference that they are passed because, in the opinion of the Legislature, a general law does not apply.

Assuming that the statutes, as they now stand, do not forbid any abandonment which results from a relocation properly made, we reach the question whether § 157 of the Pub. Sts. c. 112, authorizes the consolidation of two stopping places into one by their relocation at one point in one proceeding. The words of the statute, "may relocate passenger stations," favor such a view, although, had the singular number been used, that would not have been decisive against it. See Gen. Sts. c. 3, § 7, cl. 2; Pub. Sts. c. 3, § 3, cl. 4. But the controlling consideration is to be found in the purpose of the statute. In *Attorney General* v. *Eastern Railroad*, *ubi supra*, the test of the power to make a relocation, under the circumstances there disclosed,

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was not held to be whether the old stopping place was abandoned; the fact that the community served by the old station would be better accommodated by the new one in the same neighborhood was held sufficient to justify a relocation. Where two existing stations are in the same neighborhood, the test is to be found in the convenience of those served by the old stations. Whether, if the general public convenience would be increased by a relocation which would not unreasonably incommode those specially accommodated by the old stations, such a state of facts would likewise justify a relocation, it is not necessary now to decide. In the case cited, the change held to be authorized by the statute involved the removal of the stopping place a distance of 1,500 feet. Suburban stations are usually half a mile or more apart, while in the present case both stations are not only in the same town and neighborhood, but are less than 1,500 feet apart, and the proposed stopping place is nearly central between them. It is plain that either station might be properly relocated at the proposed site, and that the ultimate consolidation of both at that point could be accomplished by consecutive proceedings unless the consolidation of two stations is wholly forbidden. In our opinion, it is not. The intention of the present statutes is to allow such changes of stopping places in any neighborhood as, having special regard to the accommodation of that neighborhood, shall best serve the public convenience; and since the adoption of this policy by the Legislature, as shown by its imposing upon the Board of Railroad Commissioners the duty of recommending all such changes of station as it may deem expedient to secure the safety, convenience, and accommodation of the public, and the passage of the St. of 1872, c. 162, the hard and fast rule prescribed by the St. of 1865, c. 175, that the number of stopping places cannot be lessened, no longer obtains. This being so, there is no reason why two stations which are so situated that each can be properly relocated at the same point may not be so relocated at the same time and in one proceeding. In such a case, the considerations which must govern the action of the public boards whose consent is necessary are the same, whether their consent is asked to the relocations separately or to both at once. In either course, the same principles are to be applied, and the discretion to be

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exercised by them is the same. Dealing with both stations at the same time works no additional hardship to any person whose interests are prejudiced by the disuse of either stopping place, while it allows improvements which benefit the neighborhood to be more speedily and economically accomplished. If incidental advantages result to the travelling public or to the railroad corporation, that is no reason against permitting the course.

We regard the decision of this court in *Attorney General* v. *Eastern Railroad*, 137 Mass. 45, as leaving open the question now decided, as well as that whether the relocation of a single station might be so made as not to be justified by the provisions of the Pub. Sts. c. 112, § 157. In that case there remained as many stopping places in the town as before; but the old stopping place was discontinued, and the change was held to be not an abandonment prohibited by the statute, because the community accommodated by the old station were properly found by the commissioners to be better accommodated in the same neighborhood by the new. The decision notes the fact that the number of stations was not diminished, but does not state that such a result could not in any case be properly reached, and no such point was involved in the determination of that case.

It is also clear that the petition for certiorari must be dismissed for another reason. None of the petitioners are parties to the proceedings before the respondents, and none of them show such a state of facts as would entitle them to a private remedy if the action of the board was unauthorized or illegal. While, therefore, the law remains as at present, as pointed out by the decision of this court in *Davis* v. *County Commissioners*, 153 Mass. 218, the petitioners, however much their estates may be affected by the proposed changes, have no standing in court. We have stated our views upon the principal question raised by them, because we were informed at the hearing that the petitioners were in fact the persons who would be most affected by the abandonment of the old stations, and that they as well as the railroad corporation and the respondents thought an early indication of the opinion of the court upon the principal question involved of importance, not only in this case, but as affecting the community.

Petition dismissed.

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FRANK P. NOERA *vs.* H. A. WILLIAMS MANUFACTURING COMPANY & another.

H. A. WILLIAMS MANUFACTURING COMPANY *vs.* FRANK P. NOERA.

Suffolk. December 7, 1892. — January 10, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trademark — Equity — Injunction.

Upon a bill in equity to enjoin N. from using the word "Draper" as applied to other oilers than those made by the plaintiff corporation, the following facts appeared. In 1890, the plaintiff corporation purchased the stock in trade and good will of Francis Draper & Co., including the possession of their factory, of which they were tenants at will, and took a covenant from the members of the firm not to engage in the manufacture of oil cans for ten years. A little later, the plaintiff corporation took from the same firm a grant of the exclusive right to the use of the word "Draper" for oilers for the same ten years. Draper & Co. had made hardware since 1833, and had put the name "Draper" on different articles of their make. About 1880, they began to make oilers, and put their name upon them in various forms to denote that the cans were of superior excellence. For some years before 1888, and also since, there have been inferior oilers in the market resembling the genuine article, and called Draper oilers and Star oilers. From 1880 to 1884, one A. bought some cans from Draper & Co., manufactured cans resembling theirs, and marked those in which he dealt "Draper Oiler Company." Draper & Co. having stamped a lot of cans made for N. "Draper Oiler Co.," A. notified them not to use that label, alleging that he had a copyright on it. To avoid controversy, they then stamped the oilers which they made for N. "F. Draper & Co.," until 1888, when, becoming dissatisfied with him, they marked the oilers made for him "Cambridge Manufacturing and Oiler Co." In 1878, N., until then in the employ of Draper & Co., began to sell their goods on his own account. In 1882, he sold most of the oilers made by them. In 1885, he published a catalogue, calling it "Catalogue of Draper Oiler Co." A later one was entitled "Catalogue of Noera [the defendant] and Draper," etc. Up to 1887, Draper & Co. made all the oilers sold by N. under the name Draper Oiler Co. After that, N. began to have the less important parts made elsewhere, and then the oilers were completed by Draper & Co. In selling oilers, N. packed them in boxes labelled, "Draper Steel Oilers." In 1890, N. sold out to the plaintiff corporation, and for the time went out of business on his own account, and entered the employ of the plaintiff. Later in the same year, the parties released each other from the agreement made at that time. *Held*, that the bill could be maintained. *Held*, *also*, on a bill in equity brought by N. to enjoin the corporation from receiving from the post office any mail addressed to the "Draper Oil Co.," that the court would not attempt to dispose of the bill further than to deny the injunction.

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HOLMES, J. These are two bills in equity, of which the second is the most important, and we therefore take that up first. It is brought by the H. A. Williams Manufacturing Company to enjoin the defendant Noera from using the name "Draper" as applied to other oilers than those made by the plaintiff. The facts reported by the justice of the Superior Court, so far as material to our decision, are as follows. On February 28, 1890, the plaintiff purchased the stock in trade and good will of Francis Draper & Co., including the possession of their factory, of which they were tenants at will, and took a covenant from the members of the firm not to engage in the manufacture of oil cans for ten years. A little later, by way of further caution, the plaintiff took from the same firm a grant of the exclusive right to the use of the word "Draper" for oilers for the same ten years. Draper & Co. had made hardware since 1833, and had put the name "Draper" on different articles of their make. About 1880, they began to make oilers, and put their name upon them in various forms, to denote that the cans were of superior excellence. We infer that Draper & Co. acquired a right to be protected to the usual extent in the use of the word "Draper," and we see no sufficient reason to doubt that, in view of the continuity of the business, the name was capable of assignment by Draper & Co. to the plaintiff. *Russia Cement Co.* v. *LePage*, 147 Mass. 206, 209. *Hoxie* v. *Chaney*, 143 Mass. 592. *Bury* v. *Bedford*, 4 DeG., J. & S. 352.

The plaintiff has a *prima facie* case, and no fact is found by the judge which meets it as matter of law. Certain facts are reported, however, from which we are asked to infer that before 1890 the word "Draper" had become public property, and "had acquired a generic meaning, descriptive of a general kind, quality, and class" of goods. *Thomson* v. *Winchester*, 19 Pick. 214, 216. Whether it has done so or not is a pure question of fact, and evidently was considered to be such in *Thomson* v. *Winchester*, where Chief Justice Shaw's proposition is, that if the term "Thomsonian Medicines" had acquired such a meaning, the plaintiff, having no patent, had no exclusive right to call his medicines Thomsonian. See *Burton* v. *Stratton*, 12 Fed. Rep. 696, 701, 702. It is to be regretted that the judge who heard the evidence should not have found the fact one way or

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the other. All that we can say is, that, so far as we can judge, the facts put in evidence do not lead to the inference that Draper & Co. had lost their rights. See *Horton Manuf. Co.* v. *Horton Manuf. Co.* 18 Fed. Rep. 816. The facts are, first, that for some years before 1888, and also since, there have been inferior oilers in the market resembling the genuine article, and called Draper oilers and Star oilers. Next, from 1880 to 1884, one Alden bought some cans from Draper & Co., manufactured cans resembling theirs, and marked those in which he dealt "Draper Oiler Company." Draper & Co. having stamped one lot of cans made for Noera "Draper Oiler Co.," Alden notified them not to use that label, alleging that he had a copyright on it. To avoid controversy, they then stamped the oilers which they made for Noera "F. Draper & Co." till the beginning of 1888, when, becoming dissatisfied with Noera, they marked the oilers made for him "Cambridge Manufacturing and Oiler Co." Lastly, in 1878, Noera, up to that time in the employ of Draper & Co., began to sell their goods on his own account. In 1882, he sold most of the oilers made by them. In 1885, he published a catalogue, calling it "Catalogue of Draper Oiler Co." A later one was entitled "Catalogue of Noera and Draper," etc. Up to 1887, Draper & Co. made all the oilers sold by Noera under the name Draper Oiler Co. After that, Noera began to have the less important parts made elsewhere, and then the oilers were completed by Draper & Co. In selling oilers, he packed them in boxes labelled "Draper Steel Oilers." In 1890, Noera sold out to the plaintiff, and for the time went out of business on his own account, and entered the employ of the plaintiff. Later in the same year, the parties released each other from the agreement made at that time. We do not rely upon the instrument for our decision, and mention it only as fixing a date up to which, so far as appears, all the oilers sold by Noera were made or finished by Draper & Co.

If we interpret the foregoing facts correctly, they only show that, the name Draper having gained a certain commercial value as applied to oilers, there have been some attempts to steal a part of its reputation, and that those who were selling the genuine thing were glad to use a derivative name by implied license from the Drapers, who alone had a right to it. It is

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true that Draper & Co. ceased to use "Draper Oiler Co." at the demand of Alden. But that was only for the sake of peace, and perhaps because they were unduly impressed by the suggestion that Alden had a copyright. Alden's claim, so far as we can judge, was wholly without foundation. Whether it was so or not, Noera is not privy to it, and whatever else it may prove, a claim of exclusive right to the word Draper certainly does not tend to show that the word was public property.

As Noera must be enjoined from the further use of the word Draper, either upon his goods or in the name under which he does business, the first bill becomes less important. It seeks to enjoin the Williams Company from receiving from the post office any mail addressed to the "Draper Oiler Co." So far as the right to the letters follows the right to use the name, the defendant is entitled to them, but we have no means of determining the right to the letters now in the hands of the postmaster. Probably that can be settled out of court, and as it seems from the report that Noera's right to letters addressed to the Cambridge Manufacturing and Oiler Co. was admitted, we shall not attempt to dispose of the bill further than to deny the injunction.

On first bill injunction denied. On second bill decree for plaintiff.

R. W. Foster, for Noera.

A. Eastman, for H. A. Williams Manufacturing Co.

JOSEPH F. CALLANAN *vs.* MARVIN CHAPIN & others.

Hampden. September 27, 1892. — January 11, 1893.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Agreement to sell Real Estate — Specific Performance — Statute of Frauds — Delivery.

A bill in equity alleged that B., the defendant, by a written agreement under seal, duly authorized by him and for a valuable consideration, agreed to execute on a certain date a bond for a deed of land owned by him, the form of the bond, the price, and the terms of sale to be agreed upon in writing by and between the plaintiff A. and B. This agreement, which was executed by C., describing him-

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self as "agent for B.," recited that he had received from A. five hundred dollars in part payment of the land in question, "it being understood that a bond for a deed of said property is to be given to-day by B." By an unsigned agreement of the same date between A. and B. and another, B. agreed to sell, and A. and another to purchase, the land in question, according to certain terms therein set forth. The bill alleged a demand by A. on B. to execute the bond, and refusal by B., and the prayer was that B. be restrained from making a deed of the land, or placing any encumbrance thereon, and that he be ordered to execute and deliver to A. a bond as aforesaid. The case was referred to a master, who found, upon the evidence, subject to the legal construction of the contracts, that B. put the property in C.'s hands to procure a purchaser, to advertise the same, and to obtain offers of purchase; that C. had no authority to complete a contract of sale without submission to and authority from B.; that A. made to C. an offer, and was informed that it would have to be communicated to B., and that the offer was subsequently accepted "subject to a proper written contract being prepared." It did not appear that B. knew of the receipt for five hundred dollars, but it did appear that A. knew, when he paid the money to C. and obtained the instrument, "that, although the price was fixed, there were other points to be determined and details to be settled, and what such points and details were, and that the same were to be incorporated into a written agreement, and submitted to and approved by the defendants as terms of the sale." *Held*, that it was not necessary to consider whether the receipt for five hundred dollars was sufficient of itself to satisfy the Pub. Sts. c. 78, § 1, cl. 4, inasmuch as some of the essential terms were still to be agreed upon, and to be expressed in an instrument in writing to be signed by the parties; and that it could not be contended that B. ratified the act of C., inasmuch as it did not appear that B. had any knowledge of it.

A bill in equity was brought to enforce specific performance of an agreement signed by B. and the other owners of real estate to sell it to A. and another. The agreement was then put into the custody of C., as the agent of B. and the other owners, with authority to deliver it to A. and the other person on his being satisfied of their financial responsibility. There was nothing in the evidence to show that C. acted for any one but the defendants in holding the paper, and the paper was never delivered. *Held*, that, if C. was not satisfied in his own mind of the fact that A. and the other person were financially responsible, he had no authority from his principals to deliver the agreement; that, until he did deliver it, they could revoke his authority; and that, although the agreement was signed by the parties, yet as there was no delivery it never took effect, and could not be considered a sufficient memorandum within the statute of frauds.

LATHROP, J. This is a bill in equity inserted in a writ of summons and attachment, dated January 17, 1891, and returnable to the Superior Court. The bill alleges that the defendants, by a written agreement under seal, duly authorized by them, and for a valuable consideration, promised and agreed to execute, on January 15, 1891, a bond for a deed of a certain parcel of land, then owned by them, on the corner of Main Street and Railroad Row in Springfield, known as the Massa-

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soit House property; that "the form of said bond, and price and terms of sale, were agreed upon in writing by and between the plaintiff and defendants, a copy of which agreement in writing is hereto annexed, marked A, together with the written memorandum of the form of said bond, the price and terms of sale."

The agreement A, which is executed by George W. Rice, describing himself as "agent for Marvin Chapin and heirs of Ethan Chapin," and dated January 15, 1891, is as follows: "Received of Joseph F. Callanan five hundred dollars, in part payment of real estate known as the Massasoit House property, on Main Street and Railroad Row, in Springfield, said real estate including one hundred and seventy-seven feet on Main Street, and one hundred and eighty-one feet deep, and on Railroad Row, it being understood that a bond for a deed of said property is to be given to-day by Marvin Chapin and the heirs of Ethan Chapin." This is followed by an unsigned copy of an agreement, dated January 15, 1891, between Marvin Chapin, Amelia C. Haile, and E. F. Ward, of the first part, and Joseph F. Callanan and John O'Brien of the second part, by the terms of which the parties of the first part agree to sell, and the parties of the second part to purchase, the Massasoit House property, so called, the property to be conveyed by a warranty deed, within ten days, twenty thousand dollars to be paid at the time of the delivery of the deed, fifty thousand dollars in instalments of five thousand dollars each year from the date of the conveyance, with interest semiannually at the rate of four and one half per cent per annum, and the balance of one hundred thousand dollars, on demand, after ten years from the date of said conveyance, at the same rate of interest, the sums not paid in cash to be evidenced by the joint and several promissory notes of the parties of the second part, secured by a first mortgage upon the property conveyed, in the usual form, with a power of sale. The bill then alleges a demand by the plaintiff on the defendants to execute said bond, and a refusal on their part to do so; and that the plaintiff has ever been ready and willing to comply with and carry out all of his agreements in the premises.

The prayers of the bill are that the defendants be restrained

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from making any deed of conveyance of such real estate, or placing any encumbrance thereon; and that the defendants be ordered to execute and deliver to the plaintiff "a good and sufficient bond, upon the terms agreed upon, for the conveyance by deed of said bond executed to him."

The case comes before us on a report of a justice of the Superior Court, who has reserved the case for our consideration upon the pleadings, the report of a master, exceptions taken by the defendants to this report, and a copy of the evidence taken before the master.

The defendants are Marvin Chapin, Mrs. Haile, and Mrs. Ward. The master finds that on January 15, 1891, they were, and for many years before had been, the owners of the Massasoit House property; that on December 20, 1890, they entered into contracts in writing with George W. Rice, by the terms of which Rice was to attempt the sale of the Massasoit House for the period of four months. He was also to advertise it, and "in case of a sale, at terms to be agreed upon by all the parties interested," Rice was to receive a sum named.

The master found, upon all the evidence, subject to the legal construction of the contracts, that the defendants put the real estate into the hands of Rice for sale, with authority to procure a purchaser, to advertise the property for sale, to obtain proposals or offers of purchase, and to submit such proposals or offers to the owners for their approval; and that Rice had no authority to complete a contract of sale, or to sign such contract on behalf of his principals, unless, upon his submission to them of the offers of purchase, he should receive such authority. We are of opinion that this finding of the master is but an interpretation of the language contained in the contracts, and is fully warranted by their terms.

It further appears, from the report of the master, that the plaintiff made to Rice an offer for the land, and was informed that his offer would have to be communicated to the owners; that this offer was subsequently accepted, "subject to a proper written contract being prepared." It does not appear from the report of the master that the defendants knew of the execution of the receipt marked A; but it does appear that the plaintiff knew at the time he paid the five hundred dollars to Rice, and

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received this instrument, "that, although the price was fixed, there were other points to be determined and details to be settled, and what such points and details were, and that the same were to be incorporated into a written agreement, and submitted to and approved by the defendants as terms of the sale."

On these findings of the master, it is clear that the bill as framed cannot be maintained. The bill proceeds upon the theory that Rice had authority to sign the receipt A, and asks the court to order the defendants to execute the agreement, which, as appears from the master's report, was subsequently drawn up. We need not, therefore, consider whether the receipt A is sufficient of itself to satisfy the statute of frauds, Pub. Sts. c. 78, § 1, cl. 4, inasmuch as some of the essential terms were still to be agreed upon, and to be expressed in an instrument in writing to be signed by the parties. See *May* v. *Ward*, 134 Mass. 127; *Ashcroft* v. *Butterworth*, 136 Mass. 511; *Wood* v. *Midgley*, 5 DeG., M. & G. 41, as explained in *Freeland* v. *Ritz*, 154 Mass. 257, 259; *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78; *Rummens* v. *Robins*, 3 DeG., J. & S. 88. It cannot be contended that the defendants ratified the act of Rice, inasmuch as it does not appear that they had any knowledge of it.

The case has, however, been argued upon the theory that the so called bond for a deed was so executed as to be binding upon the defendants; and, as the bill might be amended to meet this view of the case, if the plaintiff's contention is correct, we proceed to consider this question. The master finds that the agreement annexed to the bill embodied the terms of sale as they were orally agreed upon by the parties; and that this instrument was signed by the defendants; that it was signed for Mrs Ward, by a duly authorized attorney, "as assenting to it in her behalf, and for the purpose of having the instrument ready for delivery, as far as Mrs. Ward was concerned, and intending that it should be delivered to Callanan, and with the expectation that, when the other defendants had signed the instrument, they would so deliver it."

The master further finds that this instrument was signed by the other defendants, "upon the condition that it was not to be delivered unless the parties Callanan and O'Brien were finan-

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cially responsible, and unless it should be ascertained, upon inquiry by David A. Reed, that the said Callanan and O'Brien were financially responsible"; that said agreement was put into the custody of Reed "for the benefit of all parties interested," and was to be delivered to the plaintiff, if the boundaries were correctly stated in the instrument, and if Callanan and O'Brien were financially responsible, and if it should be ascertained upon inquiry by Reed "that the said Callanan and O'Brien were financially responsible." The master then finds that the boundaries were correctly stated in the instrument; that Callanan and O'Brien were financially responsible; "and it was ascertained, or could have been ascertained upon inquiry by the said Reed, that the said Callanan and O'Brien were financially responsible at the time when he finally and absolutely refused to deliver the said agreement to the said Callanan; . . . and that the facts then existing and ascertained did not justify the said Reed in thus refusing to deliver the said agreement to the said Callanan; and that the said Reed was not acting in good faith when he burned and destroyed the said agreement."

It appears from the master's report, that it was not until the afternoon of January 15 that the defendants had any knowledge who the persons were who had made an offer for the property; that, after the agreement was signed by Chapin upon the conditions found by the master, Reed took the agreement and procured the signature of Mrs. Ward, by her attorney, and also the signature of Mrs. Haile, upon the conditions above stated; that Reed, after the paper had been thus signed, "immediately made inquiry of various business men in the city of Springfield as to the financial responsibility of Callanan and O'Brien, and reported to Mrs. Haile and to Marvin Chapin that the financial responsibility of the purchasers was not such in character as Rice had represented it to be"; that on the evening of that day Callanan demanded the immediate delivery of the agreement, and Reed refused to deliver it at that time, and until further inquiry could be made as to the financial responsibility of the purchasers; that on that day and on the 16th Reed made further inquiries; and that on the 17th he took the instrument to the home of Chapin, and there, in his presence and with his assent, burned said agreement.

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The defendants have taken various exceptions to the report of the master. The first relates to the finding that Reed burned the instrument with the assent of Chapin. The defendants contend that the master should have found that Reed burned it in accordance with the instructions of Chapin. The only evidence in the case on this point comes from Reed, and he testified that he burned the paper in accordance with the instructions of Chapin. Whether the master was warranted in finding as he did on this testimony is immaterial in the view we take of the case.

Nor do we deem it important to consider the other exceptions in the case, except so far as they bear upon the question of the agency of Reed. The principal exception is to the finding that the agreement "was put into the custody of said Reed by the said defendants for the benefit of all parties interested," if by that is meant for the benefit of Callanan and O'Brien, as well as for the benefit of the defendants. We find nothing in the evidence to show that Reed acted for any one but the defendants in holding the paper. So far as Chapin and Mrs. Haile are concerned, the evidence is clear that Reed was to satisfy himself as to the financial condition of Callanan and O'Brien, and was not to let the paper go out of his hands until he was satisfied. As for Mrs. Ward, her attorney testified that when he signed her name to the paper it was not completed; that he merely put her name to it in order that, if Chapin and Mrs. Haile saw fit to complete it, it might be done in his absence, so far as his client was concerned; and that he executed it in order that it might be delivered when the other parties were ready to deliver it.

The paper then, signed by the defendants, was in the hands of Reed as the agent of the defendants, with authority to deliver it on his being satisfied of the financial responsibility of Callanan and O'Brien. The sum to be paid by them in cash was a large one, and the responsibilities to be incurred by them were larger. O'Brien lived in a distant city. The paper signed by Rice called for a bond for a deed to be given that day; and although this paper was not binding upon the defendants, Callanan supposed that it was, and insisted upon a delivery of a bond for a deed that day. To say that Callanan

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and O'Brien were financially responsible, and that this could have been ascertained, is of no consequence. If Reed was not satisfied in his own mind of the fact, he had no authority from his principals to deliver the agreement; and until he delivered it, they could revoke his authority. See *Foster* v. *Mansfield*, 8 Met. 412, 415; *Daggett* v. *Daggett*, 143 Mass. 516; *Watkins* v. *Nash*, L. R. 20 Eq. 262.

Although the agreement was signed by the parties, yet, as there was no delivery, it never took effect, and cannot be considered a sufficient memorandum within the statute of frauds. *Parker* v. *Parker*, 1 Gray, 409. *Cagger* v. *Lansing*, 43 N. Y. 550. *Campbell* v. *Thomas*, 42 Wis. 437. *Popp* v. *Swanke*, 68 Wis. 364. *Wier* v. *Batdorf*, 24 Neb. 83. *Comer* v. *Baldwin*, 16 Minn. 172. *Johnson* v. *Brook*, 31 Miss. 17.

Bill dismissed.

G. D. Robinson, (*W. S. Robinson* with him,) for Amelia C. Haile.

G. Wells, for Emma F. Ward.

C. L. Long, for Marvin Chapin.

T. M. Brown & W. B. Stone, (*E. H. Lathrop* with them,) for the plaintiff.

WARREN P. KEENE *vs.* WILLIAM F. GIFFORD.

Barnstable. December 5, 1892. — January 11, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trespass — License to plant Oysters — Statute.

A license was issued to A., under the Pub. Sts. c. 91, §§ 97, 98, 99, and later statutes, to plant, etc. oysters on the flats in the tide waters of a bay. B. just previously had applied for a renewal of his license of the same flats, and, having failed to take it out, after being notified that it was to be granted, the license was issued to A., who thereafter brought an action of tort under the Pub. Sts. c. 91, § 99, against B. for entering the flats and carrying away oysters. *Held*, that the statutes contemplate a written and recorded license, and whatever right the defendant might have had if he had called for his second license upon receiving notice that it had been awarded to him, his failure to call for it left it open for the selectmen to grant a license to the plaintiff, and the license so granted was valid, and the fact that oysters planted by the defendant remained upon the territory gave the defendant no right to gather them after the plaintiff obtained his license.

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TORT, for trespass. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, which are stated in the opinion.

C. F. Chamberlayne, for the defendant.

H. P. Harriman, for the plaintiff.

BARKER, J. The agreed facts show that the defendant took oysters from flats in the tide waters of Bourne, in Buzzard's Bay, at a time when those flats were under license to the plaintiff. The license was issued on April 26, 1890, and the oysters were taken in the following October; but the defendant had had a license of the same flats, which had expired by its own limitation in June, 1889, when there were on the flats about five hundred bushels of oysters which he had placed there. He applied for a renewal of his license, but, although notified by the selectmen that they had concluded to grant it, he did not take it out; and the license to the plaintiff was upon an application made several months subsequently. The contention of the defendant is, that the oysters which he took were his own property, which he had a right to take, and that the plaintiff's lease, if not void, certainly could not impair the defendant's private right to recover his own oysters from the sea.

The oyster has no power of locomotion, and after the spat has once acquired a shell remains in its original bed unless forcibly removed. It thrives only if constantly covered by the tide, and cannot, therefore, be taken except by disturbing to a greater or less extent ground the ownership of which is in the Commonwealth or the town, and not in private persons. The oyster fishery has been regulated by statute from early times. By the Prov. St. of 1764–65, 4 Prov. Laws, (State ed.) 743, all persons were forbidden to take oysters in any of the bays, ports, or rivers of the Province without leave of the selectmen, except that an inhabitant might take oysters for his own eating, or for market in his own town. This statute seems to have been continued in force until the adoption of the St. of 1795, c. 71, the provisions of which are yet substantially in force. See Rev. Sts. c. 55, §§ 11–17; Gen. Sts. c. 83, §§ 12, 13, 15; Pub. Sts. c. 91, §§ 93, 94, 95, and 96. The St. of 1795, c. 71, was discussed in *Dill* v. *Wareham*, 7 Met. 438, 446, and in *Commonwealth* v. *Manimon*, 136 Mass. 456. An examination of the statutes shows that the fishery has not been an open one in our

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waters since 1765, and that no provision was made until 1848 by which, if an individual artificially created oyster beds on public flats, he could be protected in their enjoyment, and allowed to take oysters from them at pleasure.

The original provisions for licensing of flats to individuals were contained in an act concerning the planting of oysters (St. 1848, c. 152), the provisions of which were continued in the Gen. Sts. c. 83, §§ 16, 17, 18, and in the Pub. Sts. c. 91, §§ 97, 98, 99. Other provisions have been from time to time added. See St. 1878, c. 179; Pub. Sts. c. 91, §§ 100, 101; St. 1884, c. 284; St. 1885, c. 220; St. 1886, c. 299. The plaintiff's license was regularly issued under these provisions. They contemplate a written and recorded license, and whatever right the defendant might have had if he had called for his second license upon receiving notice that it had been awarded to him, his failure to call for it left it open for the selectmen to grant a license to the plaintiff, and the license so granted was valid.

It remains to consider whether the fact that oysters planted by the defendant remained upon the territory gave the defendant any right to gather them after the plaintiff obtained his license. The facts that the place licensed is not to contain a natural oyster bed, and the low price charged in fees, make it apparent that the purpose of the statute is to encourage the artificial propagation of oysters. Young oysters or spat brought by the currents into contact with any solid material upon the sea bottom adhere, acquire shells, and grow. In this way new beds are made. If oysters which have shells are removed from one locality to another, they increase in size and improve in quality. It was expected that licensees would in one or both of these ways make artificial oyster beds on the flats licensed to them. The exclusive occupation of the territory for a considerable time was originally essential to the profit of the undertaking, and is secured by making the license for so long a term as twenty (now ten) years, and by giving during the term the exclusive use of the territory. It does not appear for what term the defendant's license had been granted, but if for less than the maximum, it was at least for a term satisfactory to himself, and of which he knew the limit. During that term he had for his private use a part of the public domain, without any payment in the nature of rent, and certainly with-

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out any implied or expressed promise of further exclusive rights after the expiration of his term. In planting oysters upon the territory, he was not making use of a common on which he had a right to depasture them, reclaiming them at his will, but was placing upon lands of which in effect he had a lease articles which would, as it were, become part of the land itself, and which could not lawfully be removed by him except during the term of his occupancy, and in accordance with its conditions. There is no indication in the statute of an intention to forbid the relicensing to another of territory which has been so improved. It is naturally to be expected that the presence of oysters for a number of years in any locality will tend to make in the vicinity extensive and valuable beds. Upon the expiration of a license, if the territory contains no natural oyster beds it is for the selectmen to say whether the territory shall be open to all lawful fishing, or shall be again placed in the control of the former licensee or of some other person. Oysters planted under this system, if not a part of the realty itself, can be removed only in pursuance of the provisions of the statutes regulating the fishery. So long as the one who deposited them has a license, he may take them in accordance with the conditions of his license. By accepting his license he consents that his rights shall be limited by its terms, and when it ceases all his rights in the oysters are at an end. After that time he is under the statutory prohibition. For this reason the term is made sufficiently long, so that he may have full opportunity to reap the benefit of his labor. Thus no private rights of the defendant were impaired by the granting of the license to the plaintiff, and after that license had been granted the defendant could not take oysters from the flat, without the plaintiff's consent, without making himself liable in an action of tort under Pub. Sts. c. 91, § 99. The cases from New York and New Jersey cited by the defendant are all clearly distinguished from the case at bar, by the provisions of our statutes above cited. See *Fleet* v. *Hegeman*, 14 Wend. 42; *McCarty* v. *Holman*, 22 Hun, 53; *Sutter* v. *Van Derveer*, 47 Hun, 366; *People* v. *Hazen*, 121 N. Y. 313; *State* v. *Taylor*, 3 Dutch. 117; *Britton* v. *Hill*, 12 C. E. Green, 389; *Grace* v. *Willets*, 21 Vroom, 414.

Judgment affirmed.

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CHARLES H. MEAD *vs.* PHENIX INSURANCE COMPANY.

Suffolk. November 28, 1892. — January 11, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Policy of Insurance — Description — Property insured — Exception rendered immaterial.

In an action on a policy of insurance for one year from September 8, 1890, at noon, it appeared that the application was made out on that day for the plaintiff by an insurance agent, not an agent of the defendant, and was forwarded to one C., the defendant's agent at O., whom it reached at about noon on September 9. The property intended by the plaintiff to be insured had been burned earlier on the same day. C. made out the policy, and after a delay of a few days forwarded it. The property was described in the policy following the application, as grain "contained in the Elevator Building of the Ogdensburg Terminal Company at O., N. Y." On September 8, there were two elevators at O., both operated by the Ogdensburg Terminal Company; one new, owned by it, the other older, owned by a railroad company, but then let to the Terminal Company. The latter, which contained the plaintiff's grain, was burned on the 9th, as C. knew; and C. testified that that elevator was known and distinguished as the Railroad Company's elevator, and the other as the Terminal Company's elevator. *Held*, that the court rightly directed a verdict for the defendant.

The plaintiff's exception to the introduction of evidence by the defendant was *held* to be immaterial by the judge's directing a verdict for the defendant.

HOLMES, J. This is an action on a policy of insurance purporting to run for one year from September 8, 1890, at noon. The application was made out on September 8 for the plaintiff by an insurance agent, not an agent of the defendant, and was forwarded to one Chapin, the defendant's agent at Ogdensburg, whom it reached about noon on September 9. The property intended by the plaintiff to be insured had been burned earlier on the same day. The agent made out the policy, and after a delay of some days forwarded it. There were later dealings which we do not deem it necessary to state. The property insured was described in the policy, following the words of the application, as grain "contained in the Elevator Building of the Ogdensburg Terminal Company at Ogdensburg, N. Y." On September 8 there were two elevators at Ogdensburg, both operated by the Ogdensburg Terminal Company; one, a new one, owned by it; the other, an older one, owned by the Ogdensburg

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and Lake Champlain Railroad Company, but then let to the Terminal Company. The latter contained the plaintiff's grain. It was burned on the 9th, as Chapin knew, he having been present at the fire. Chapin testified that that elevator was known and distinguished as the Ogdensburg and Lake Champlain Railroad Company's elevator, and the other one as the Terminal Company's elevator. Subject to the plaintiff's exception, Chapin was allowed also to testify that, when he had the policy filled out, he intended to insure grain in the elevator which still was standing. This exception is immaterial, since the judge directed a verdict for the defendant, and therefore any testimony in its favor which a jury could have been warranted in disbelieving must be laid on one side. But apart from Chapin's testimony, there is only one rational view of the facts. It is absurd to suppose that he understandingly issued a policy on grain in an elevator which his own eyes had just seen burned to the ground.

Perhaps it would be pressing the principle of such cases as *Kyle* v. *Kavanagh*, 103 Mass. 356, and *Raffles* v. *Wichelhaus*, 2 H. & C. 906, too far to say that the description of the elevator containing the corn was one proper name in the mouth of the plaintiff, and another in that of the defendant, and that therefore the policy was void, and the supposed contract never made. On the other hand, it cannot be said that the description on its face pointed to the burned elevator alone, or that the defendant is in the position of having assented to words which it knew that the plaintiff was taking as describing the burned elevator. The most that can be said in favor of the plaintiff is, that the description, although meaning only one, and although most accurately fitting the elevator owned by the Terminal Company, was broad enough to apply to either elevator if the circumstances permitted and required it; in other words, that there was a latent ambiguity. See *Fowle* v. *Springfield Ins. Co.* 122 Mass. 191, 194, 198. Taking it that way, what were the circumstances? The plaintiff relies on the fact that his grain was in the old elevator. But the policy identifies the grain by the building, not the building by the grain. The plaintiff knew that there were two elevators in Ogdensburg, and had notice that the agent applied to for insurance was at the same place. He knew that that agent would not inquire at the elevators for the plaintiff's

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grain, but would rely on the description. He must be taken to have had notice that, if an elevator should burn, the agent would be likely to know it, and that he would not insure the burned property thereafter. Under these circumstances, we think it plain that justice is against the plaintiff's claim, and perhaps it is not necessary to decide with extreme accuracy what the true ground for giving judgment for the defendant is. It might be argued that the plaintiff was bound by that construction of the policy which a reasonable man would give it under the circumstances in which it was issued, if the defendant gave it that construction in fact; that the only reasonable construction is one which would describe the still standing elevator, especially as that elevator was in a fuller sense than the other the building of the Terminal Company, and therefore that the policy, being upon grain in a building where the plaintiff had no grain, it was void. As a further reason for this view, it should be mentioned that the plaintiff's agent evidently used the words in the application as meaning the elevator owned by the Terminal Company, although his motive for doing so was mistaken. Another sufficient ground of decision is, that, however it may be when a policy on goods at a distance, the present condition of which is unknown, is dated back to a time before the agreement to insure, as in *Hallock* v. *Commercial Ins. Co.* 2 Dutch. 268, and *Commercial Ins. Co.* v. *Hallock*, 3 Dutch. 645, the antedating of this policy by a day under the cirumstances which we have described cannot be taken to have meant to insure the goods, burned or not burned, but the contract must be read as conditioned on the existence of the goods at the time when it was made in fact.

Still more shortly it may be said that Chapin had no authority to insure goods in the elevator which he knew was burned. *Wilson* v. *New Hampshire Ins. Co.* 140 Mass. 210. *Stebbins* v. *Lancashire Ins. Co.* 60 N. H. 65.

We see no reason to doubt that the foregoing principles would prevail in New York as well as here. The decisions relied on by the plaintiff would not have warranted the jury in finding that a different version of the common law from the one which we deem correct is accepted there. In both *Lightbody* v. *North American Ins. Co.* 23 Wend. 18, and *Whitaker* v. *Farmers' Union Ins. Co.* 29 Barb. 312, the contract of insurance had been

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made, and a receipt given for the premium, before the fire, although the policy was not delivered until afterwards.

It was suggested that the jury might have found that the two elevators were one, and were collectively covered by the description, because connected by a belt gallery four hundred feet long. We are of a contrary opinion.

Judgment on the verdict.

A. A. Wyman, for the plaintiff.

L. S. Dabney, for the defendant.

AGNES MILLER *vs.* EDWIN P. CURTIS.

Worcester. October 7, 1892. — January 17, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Assault and Battery — Evidence.

In an action for an indecent assault upon a woman, evidence of specific acts of the plaintiff, more than twenty years previously, tending to show that she had repeatedly made false charges of indecent assaults upon her, with a view to extort money from innocent men, although limited to the question of damages, is incompetent.

TORT, for an assault and battery on three separate occasions, the first in March, 1889, at Worcester, and the other two in May, 1889, at Spencer. Answer, a general denial. Trial in the Superior Court, before *Corcoran*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff's evidence showed that an assault and battery was made by the defendant upon the plaintiff, who is a married woman, and attempts by him to have sexual intercourse with her without her consent, at Worcester and at Spencer.

The plaintiff and her husband were both witnesses, and, after they had testified, the following evidence was admitted, against the objection of the plaintiff, all of which related to transactions unconnected with and over twenty years before the alleged assaults.

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One Fottler testified as follows: "I knew the Millers thirty years ago at Hingham; my father bought real estate of them, and I sold goods to them. I visited them in Westborough about the bill six or seven years after; both were present. Mrs. Miller made the remark that they owned the property. I expressed a little wonder at their owning it, not having lived there very long. She said she got the money to pay for it herself, and she turned to her husband and said she knew how to get money out of these rich old fellows; that was the remark. Her husband stood near, and she turned and said as long as her husband did not find fault it was all right."

Charles Tenney of Westborough testified that he was eighty years of age, and very deaf; that he worked for the Millers in Westborough twenty-five years ago; that on one occasion he was called down cellar by the plaintiff to do some work, and soon after they got down she rushed up again and complained to her husband that she had been assaulted; and that he was obliged to leave his place without receiving his wages.

Patrick Gately of Spencer testified that he worked for the Millers in Spencer sixteen years ago. He related a conversation with the plaintiff, the details of which were unfit for publication; and which was to the effect that the plaintiff told him that, when they lived in Westborough, her husband got $18 out of a man who assaulted her, and she was so mad because he did not get more that she threw the money in the fire.

Charles M. Fay of Westborough testified that, in 1867, he worked for one Winslow in Westborough, and the Millers lived near them; that the plaintiff at one time told him that she was going to sue Winslow for insulting her; and that the witness told that to Winslow.

Charles P. Winslow testified that he had lived in Westborough about forty years; that when he returned from the war, he lived near the Millers; that he remembered Fay's telling what the plaintiff said about him; that previously to this, he was alone with her only once, two or three days before; that he went to Miller's to get him to go skating; that the plaintiff came to the door, and got him to come in to see the stock; that they looked at the cattle in the barn, and then went into the house; that he did not stop long, and nothing out of the way took place;

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and that he was not alone with her at other times, and nothing of an improper nature ever took place between them.

Charles H. Fayerweather of Northborough testified that he had lived near the Millers in Westborough, which was over twenty years ago, and had dealings with them; that he sold a heifer to them, which they led away with a halter they borrowed of him; that he drove to their home to get the halter, and met the plaintiff, who got it for him; that that was all that took place; that a little later he had a talk with Miller, who told him he must settle for assaulting his wife; that Miller told him to think it over, and later called again and told him he could settle for $50; and that the witness refused to pay him anything.

The plaintiff and her husband had both been cross-examined regarding each of the incidents testified to by these witnesses, and had denied them wholly. The judge, in admitting the evidence, instructed the jury that it was to be considered only on the question of damages.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in October, 1892, and afterwards was submitted on the briefs to all the judges.

W. A. Gile, (*C. S. Forbes* with him,) for the plaintiff.

W. S. B. Hopkins, (*F. B. Smith* with him,) for the defendant.

KNOWLTON, J. The defendant was allowed to introduce evidence of several transactions and conversations with the plaintiff, all occurring more than twenty years ago, which tended to show that she had repeatedly made false charges of indecent assaults upon her, with a view to extort money from innocent men. The defendant denies the charge made against him in the suit, and contends that the plaintiff is trying unjustly to obtain money from him.

In any case, where the question is whether the defendant has committed a crime, it would naturally affect the opinion of jurors to know that he had often committed similar crimes; but evidence of such facts is never admitted to prove a defendant's guilt. *Commonwealth* v. *Jackson*, 132 Mass. 16. *Commonwealth* v. *Robinson*, 146 Mass. 571. That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first; and a

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person charged with one offence cannot be expected to come to court prepared to meet a charge of another. If the doing of one wrongful act should be deemed evidence to prove the doing of another of a similar character which has no connection with the first, issues would be multiplied indefinitely without previous notice to the defendant, and greatly to the distraction of the jury. It is too clear for argument, under the authorities, that most of the evidence excepted to was not competent on the question of liability, and the defendant does not seriously contend that it was.

It is argued, however, that it was competent on the question of damages, and the jury were instructed to consider it only on that question. There is much authority for the proposition, that in a suit of this kind, when a plaintiff seeks damages for an injury to her feelings, growing out of the indecency of the defendant's conduct, her character in regard to chastity is in issue, and her damages depend somewhat on the question whether she is a virtuous woman, who would be greatly shocked at the peculiar nature of the assault, or a woman who is accustomed to yield herself to illicit intercourse. There has been much difference of opinion among judges in regard to the evidence to be received in such cases. It has been held that evidence of general reputation in regard to chastity is competent, and sometimes that specific acts of lewdness may be shown, and sometimes that they may not. *Mitchell* v. *Work*, 13 R. I. 645. *Gore* v. *Curtis*, 81 Maine, 403. *Watry* v. *Ferber*, 18 Wis. 500. *Ford* v. *Jones*, 62 Barb. 484. *Gulerette* v. *McKinley*, 27 Hun, 320, 324. See also *Sheahan* v. *Barry*, 27 Mich. 217; *Johnson* v. *Caulkins*, 1 Johns. 116; *West* v. *Druff*, 55 Iowa, 335; *White* v. *Murtland*, 71 Ill. 250; *Love* v. *Masoner*, 6 Baxter, 24; *Carpenter* v. *Wall*, 11 A. & E. 803. *Boynton* v. *Kellogg*, 3 Mass. 189.

If it were permissible to show specific acts of criminal intercourse on the part of the plaintiff to affect the damages to be awarded in actions for an indecent assault, it would not follow that the evidence excepted to in the present case should have been admitted. Most, if not all, of this testimony tended to prove, not that the plaintiff had had criminal intercourse with other men, but that she had falsely pretended that others had indecently assaulted her, with a view to extort money from them.

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The rule contended for certainly should not be extended so far as to admit testimony of common crimes and ordinary wrongful acts, merely to show general depravity.

But we are inclined to hold the evidence incompetent on broader grounds. It is a general rule, which has been adhered to with great strictness in this Commonwealth, that, when character is in issue, it may be shown only by evidence of general reputation, and not by proof of specific acts. This is the rule in actions of slander. *Chapman* v. *Ordway*, 5 Allen, 593. *Parkhurst* v. *Ketchum*, 6 Allen, 406. *Clark* v. *Brown*, 116 Mass. 504. *McLaughlin* v. *Cowley*, 131 Mass. 70. So also in prosecutions for rape, where the character for chastity of the woman is involved. *Commonwealth* v. *Harris*, 131 Mass. 336. The same rule applies in criminal cases where the accused introduces evidence of his good character, and there is evidence in rebuttal. *Commonwealth* v. *O'Brien*, 119 Mass. 342.

The principal reason for this rule is, that a multiplicity of issues would be raised if special acts, covering perhaps a lifetime, could be shown. It might be necessary to go into the circumstances attending each act before it could be determined what its nature was, and what effect should be given to it. It would be impossible for the opposing party to be prepared to meet evidence upon matters in regard to which he had no notice, and great injustice might be done by hearing biased and false testimony to which no answer could be made.

We are of opinion that it is safer and better, in cases of this kind, to adhere to the rule that excludes evidence of specific acts when offered for the purpose of showing character. In *Gore* v. *Curtis*, 81 Maine, 403, this rule was applied to a case almost exactly like the one at bar.

There is some ground for the contention that the testimony of Fottler was admissible on the main issue, as a declaration of a purpose on the plaintiff's part to obtain money by falsely accusing men of making indecent assaults upon her. If it were clear that such a construction should be put upon the testimony, it would be competent. But, excluding the other incompetent evidence and taking it alone, it is too indefinite to show that the plaintiff referred to anything of this kind. It gives a remark made by her twenty-three or twenty-four years before the trial,

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in reference to getting "money out of these rich old fellows," without any intimation of how she got it.

The evidence excepted to was of a kind greatly to prejudice the plaintiff on the question of liability, and, it being incompetent for any purpose, it cannot be held that she was not injured by the admission of it. *Ellis* v. *Short*, 21 Pick. 142. *Brown* v. *Cummings*, 7 Allen, 507. *Crowell* v. *Porter*, 106 Mass. 80. *Maguire* v. *Middlesex Railroad*, 115 Mass. 239. In this respect the case differs from those in which it is held that the admission of incompetent evidence on an issue which is made immaterial by the verdict does not render a new trial necessary when the evidence was not of a nature to prejudice the jury on the questions involved in their finding. See *Robinson* v. *Fitchburg & Worcester Railroad*, 7 Gray, 92; *Lawler* v. *Earle*, 5 Allen, 22; *Anthony* v. *Travis*, 148 Mass. 53. *Exceptions sustained.*

EVERETT A. DUNHAM & another *vs.* CHARLES M. MORSE, JR.

Bristol. October 25, 1892. — January 17, 1893.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Promissory Note — Consideration — Life Insurance — Contract — Principal and Agent — Action.

A., in order to obtain insurance upon his life at once, instead of waiting for the action of the insurance company on his application, gave a promissory note for the amount of the premium payable to B., an agent of the company, who signed and delivered to A. a contract purporting to give such insurance, which was expressed to be subject to certain conditions printed on the back, one of which was that the contract was not valid unless the premium was "actually paid in cash," and another of which was that none but certain designated officers of the company had authority to alter the contract. B. charged himself with the amount of the premium, and gave the company credit for it, on his books; but he did not pay the company any cash on account of this insurance until long after the policy had been tendered to A. and the contract had been repudiated by him. B. had been accustomed to keep money received for the company in his private bank account, with the knowledge and consent of the company; but the company had no knowledge that A. had not paid his premium in cash, and did not waive the condition printed on the back of the contract. *Held*, in an action by B. against A. upon the note, that the note was without consideration.

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CONTRACT, upon a promissory note for $184, dated November 22, 1888, payable in ten days after date to the plaintiffs, and signed by the defendant. The answer set up want of consideration. Trial in the Superior Court, without a jury, before *Bishop*, J., who ruled that the action could not be maintained, found for the defendant, and, at the request of the parties, reported the case for the determination of this court. If the ruling was right, judgment was to be entered for the defendant; otherwise, judgment was to be entered for the plaintiffs. The material facts appear in the opinion.

J. F. Jackson, for the plaintiffs.

H. M. Knowlton, (*T. F. Desmond* with him,) for the defendant.

KNOWLTON, J. The only question in this case is whether the note declared on was given without consideration. The testimony shows that the only purpose of the defendant in giving it was to obtain insurance upon his life at once, instead of waiting for the action of the insurance company on his application. If a contract of insurance binding on the company was given him, the note is good; otherwise, it is not.

The contract, which was signed and delivered by the plaintiffs as agents for the company, purported to give such insurance, but it was expressed to be subject to certain conditions printed on the back, one of which was that the contract was not valid unless the premium was "actually paid in cash." There was nothing to show that the agents had authority to alter the contract in this respect, and it was one of the conditions referred to that none but certain designated officers of the company had such authority. See *Kyte* v. *Commercial Union Assurance Co.* 144 Mass. 43.

If this premium was not paid in cash, the contract of insurance was not binding on the company, and the note was without consideration. It is not contended that the defendant made any payment in cash. He gave the agents the note in suit, payable ten days after date. The plaintiffs did not pay the insurance company any cash on account of this insurance until long after the policy had been tendered to the defendant and the contract had been repudiated by him. It is not contended by the plaintiffs that either of the parties was bound to anything by their negotiations, unless the contract delivered to the defendant was im-

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mediately binding upon the company. All the plaintiffs did to make it binding was to charge themselves with the amount of premium, and to give the insurance company credit for it on their books. It is true that the plaintiffs had been accustomed to keep money received for the company in their private bank account, with the knowledge and consent of the company; but this was not equivalent to an agreement that a credit on the plaintiffs' books should constitute a payment in cash to the company when no money had been received. Such an entry on the books was not payment in cash by the agents, and giving a note was not payment in cash by the insured.

The insurance company had no knowledge that the defendant had not paid his premium in cash, and did not waive the condition printed on the back of the contract. They might be willing to allow their agent to bind them by a contract if he received the premium in cash, even though he was permitted to deposit it in his own bank account, when they would not be willing to be bound on his promise to pay them if he had no cash, but only a promissory note, as his reliance for the means of performing his promise. *Whiting* v. *Massachusetts Ins. Co.* 129 Mass. 240.

This case differs from *Chickering* v. *Globe Ins. Co.* 116 Mass. 321, *White* v. *Connecticut Ins. Co.* 120 Mass. 330, *Wheeler* v. *Watertown Ins. Co.* 131 Mass. 1, 7, and *Bouton* v. *American Ins. Co.* 25 Conn. 542. In each of these last mentioned cases a payment in cash was not called for, but anything that could fairly be called payment, and which was accepted as such, would answer the requirements of the policy.

We are of opinion that the note was without consideration.

Judgment on the finding.

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WILLIAM O'MALEY *vs.* SOUTH BOSTON GAS LIGHT COMPANY.

Suffolk. December 2, 1892. — January 17, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Negligence — Defective Machinery — Assumption of Risk.

It is a defence to an action under the St. of 1887, c. 270, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by reason of the defective condition of the "ways, works, or machinery" of the defendant, that the plaintiff, when he entered upon the employment, knew and fully appreciated the danger to which he was to be exposed.

TORT, under the St. of 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Sherman*, J., who, at the defendant's request, directed the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, the verdict was to be set aside and a new trial granted. The material facts appear in the opinion.

J. P. Barlow, for the plaintiff.

C. P. Greenough & J. P. Parmenter, for the defendant.

KNOWLTON, J. The plaintiff, while wheeling coal in a barrow on a run in one of the defendant's coal sheds, fell off and was injured. The action is brought under the employers' liability act (St. 1887, c. 270), for an alleged defect in the ways, works, or machinery of the defendant, it being contended that the defendant was negligent in not providing guards on the runs to prevent such an accident. The plaintiff testified, and it was undisputed, that he had assisted in the same work at various times during the last fifteen years, and that the coal shed and runs had all the time remained unaltered in construction.

If the action were at common law, it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened, and that the defendant is not liable.

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Fitzgerald v. *Connecticut River Paper Co.* 155 Mass. 155. *Mahoney* v. *Dore*, 155 Mass. 513. But it is contended that, under the statute referred to, the rule is different.

It is well settled that, in the absence of a special contract affecting the rights and liabilities of the parties, the statute has taken away from defendants, in the cases mentioned in it, the defence that the injury was caused by the act of a fellow servant of the plaintiff. It is also established by an adjudication of this court, and by decisions under a similar statute in England, that it has not taken away the defence that the plaintiff, knowing and appreciating the danger, voluntarily assumed the risk of it. *Mellor* v. *Merchants' Manuf. Co.* 150 Mass. 362. *Thomas* v. *Quartermaine*, 18 Q. B. D. 685. *Yarmouth* v. *France*, 19 Q. B. D. 647. *Thrussell* v. *Handyside*, 20 Q. B. D. 359. *Walsh* v. *Whiteley*, 21 Q. B. D. 371. *Smith* v. *Baker*, [1891] A. C. 325. Precisely how and when this defence can be availed of in cases where the ways, works, and machinery of the defendant are found to be defective, has never been decided in this Commonwealth. The nature of the defence was somewhat considered in *Fitzgerald* v. *Connecticut River Paper Co.* and *Mahoney* v. *Dore*, *ubi supra*, which were cases at common law, and it was held that, to be precluded from recovering on this ground, the plaintiff must not only know and appreciate the risk, but must assume it voluntarily. The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria.* One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case, there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty.

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That part of the statute under which this action is brought gives a remedy only for defects "which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition." A proceeding under it necessarily involves the question whether there was negligence in not having the ways, works, and machinery in better condition. The negligence referred to is the neglect of a duty owed to the plaintiff, and not of a general duty, which, by reason of the relations of the parties, does not extend to him.

The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. In the numerous enterprises of every kind which involve the employment of labor, there is necessarily almost every degree of danger to employees. Improvements are constantly being made in the methods of doing business, and in the ways, works, and machinery used. The adoption of the latest and best machinery would often involve the displacement and loss of that which has been but little used, and which was the best obtainable when bought. It would be unreasonable to attempt to require every one hiring laborers to have the safest place and the best machinery possible for carrying on his business. It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of the machinery used. Nothing but the plainest expression of intention on the part of the Legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery as well since the enactment of this statute as before. If he does so, his employer owes him no duty in respect to such risks, and if he is hurt from a cause included in the contract, the defect is not within the terms of the statute, the maxim, *Volenti non fit injuria*, applies, and he cannot recover. Whether he knows and appreciates the particulars of the danger is imma-

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terial, if he knows there is danger, and expressly contracts in regard to it without caring to know the particulars, and in such a case he must be deemed to encounter it willingly. One who makes a contract to enter into a new relation undertakes voluntarily what he agrees to do, and his agreement, inasmuch as the other party acts upon it, is to be construed in reference to the obvious facts and circumstances to which it pertains. When he agrees to assume the risk from a certain kind of machinery, his action is equally voluntary in reference to every such risk, whether he fully appreciates the danger or chooses to take the risk of it without knowing its extent; and he absolves his employer from what otherwise would be a duty to make the machinery safer.

The same reason applies equally where the employee, without any express stipulation in regard to risks, enters a service which, by reason of the obvious condition of the ways, works, and machinery, involves peculiar dangers. Such a contract is implied as ought to be implied from the situation and dealings of the parties, and it has the same effect as if expressly made. The work to be done may have special reference to defects in the works or machinery. One may be hired to make repairs which expose him to peculiar dangers by reason of the condition of the defective parts. Surely it cannot be said that a workman does not impliedly contract to take the obvious risks from the condition of the machinery, when he agrees to do work in the repair of it. Nor can it any more be said that he does not impliedly make a similar contract, when he agrees to work in a business involving obvious dangers by reason of the inferior machinery with which he knows it is to be carried on. He is free to accept the service or not, as he chooses, and, if harm comes to him by reason of his acceptance of it, he suffers voluntarily.

It is manifest that these considerations in reference to a contract, express or implied, do not apply to dangers resulting from conditions which arise or defects which come into existence after the making of the contract, which cannot be deemed to have been contemplated when the contract was made.

The precise question involved in this case does not seem to have been settled in England, although there has been much

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discussion and a variety of opinion in regard to questions closely allied to it. It is held by all the judges there that the maxim, *Volenti non fit injuria*, applies as well to actions under the statute as to those at common law; but none of the cases which have come to our attention have determined the effect of a contract to work in a place obviously dangerous by reason of inferior machinery or appointments when the contract was made. Sometimes it seems to have been assumed that the defence of an implied contract to assume the ordinary risks of a business is taken away by the statute, without recognizing any distinction between an implied contract founded on the known condition of the ways, works, and machinery in reference to which the contract is made, and a contract in reference to dangers from the negligence of fellow servants, or the subsequent neglect of the master. In *Walsh* v. *Whiteley*, 21 Q. B. D. 371, the decision of the Lords Justices Lindley and Lopes, a majority of the court of appeals, tends to support the view we have taken, although the judgment is on different grounds. So also does the judgment in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, which has been often considered and explained, but never overruled. In *Smith* v. *Baker*, [1891] A. C. 325, elaborate opinions were given in the House of Lords, showing considerable difference of view on some of the questions we have been considering; but the effect of a contract to work under exposure to peculiar dangers from machinery, obvious when the contract was made, was not much considered.

In the present case, the plaintiff when he made his contract knew and fully appreciated the dangers to which he was about to expose himself; for they were obvious, and he had been accustomed to work on the runs, from time to time, for fifteen years, during which period they had remained unchanged. We are of opinion that he impliedly contracted to work on the runs as they were, and that, if they can be considered defective, the defect is not within the description in the St. of 1887, c. 270, § 1, inasmuch as the defendant owed him no duty in regard to it, and he cannot say that its continued existence was owing to the negligence of his employer.

Judgment on the verdict.

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ISAAC F. WOODBURY & another *vs.* ANDREW J. POST & another.

Suffolk. November 28, 1892. — January 19, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Indemnity — Declaration — Demurrer.

A., a contractor engaged in erecting a building, and B., an independent contractor engaged in doing certain work on the building, entered into an agreement in writing, by which B. was allowed to use A.'s engines and derricks at the building at a certain rate of compensation, and which contained the following provision: "If any injury shall be occasioned to any person or property while you [B.] are using such engines or derricks, or as a result of such use, you [B.] are to indemnify us [A.] against any damage or expense by reason of the same, notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our [A.'s] employees upon the derrick or engine, may have caused or contributed to the injury." Owing to the defective condition of one of the derricks, while B. was using it, an employee of A., who was not working upon the derrick, was injured, and A. paid him a certain sum in settlement of his claim for such injury. *Held*, in an action upon the agreement, that B. undertook to indemnify A. against the expense incurred by him in his settlement with the injured person.

A declaration containing two counts alleged, in the first count, that the plaintiff was engaged as a contractor in erecting a building, and owned certain derricks and their appliances used in the construction of the building; that the defendant was engaged as an independent contractor in doing certain work on the building; that the plaintiff and the defendant entered into a valid written contract, a copy of which was annexed; that on a certain day, while the contract was in full force, and while the defendant was using one of the derricks, the derrick and its appliances broke and gave way, and injured certain persons named; that the breaking and giving way of the derrick and its appliances were caused by their unsafe and defective condition, of which the plaintiff knew, or by the exercise of due care ought to have known; that the injured persons did not know, and by the exercise of reasonable diligence and care would not have known, of such condition of the derrick and its appliances; that the plaintiff, knowing that the defendant was using the derrick, negligently ordered and allowed the injured persons to work for the plaintiff in a place that was dangerous owing to the condition of the derrick and its appliances, and their use by the defendant in that condition, and did not warn the injured persons of their danger; that the injuries were caused by such negligence of the plaintiff; that the injured persons were in the exercise of due care, and were regularly performing the duties of their employment as employees of the plaintiff; that the plaintiff was legally liable to the injured persons for all such injuries sustained by them; that the plaintiff, being threatened with suits by the injured persons, paid each a certain sum by way of compromise and in settlement of their claims; that the plaintiff gave the defendant immediate notice of the accident, and of his liability therefor, under the contract between them; that the defendant refused to settle the claims, and the plaintiff, before settling them, gave reasonable notice to the defendant of his intention so to settle them; and that the defendant owed the plaintiff the amount so paid in such settlements.

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The second count was similar to the first, except that, in the allegations of knowledge of the condition of the derrick and of negligence, the plaintiff's "superintendent" (without naming him) was substituted for the plaintiff himself. By the contract annexed to the declaration, the defendant was allowed to use the plaintiff's engines and derricks at the building at a certain rate of compensation; and it contained the following provision: "If any injury shall be occasioned to any person or property while you [the defendant] are using such engines or derricks, or as a result of such use, you [the defendant] are to indemnify us [the plaintiff] against any damage or expense by reason of the same, notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our [the plaintiff's] employees upon the derrick or engine, may have caused or contributed to the injury." *Held*, on demurrer, that the declaration set out a good cause of action.

CONTRACT. The declaration contained two counts, the first of which was as follows:

"And the plaintiffs say that on or about October 16, 1890, they were engaged as contractors in erecting a building known as the new Public Library building, in Boston, in said county of Suffolk; that at and about said date they were owners of certain derricks and the appliances of said derricks, used in the construction of said building; that on and about said sixteenth day of October, 1890, the defendants were engaged as independent contractors in placing iron roof trusses in said building; that on or about June 13, 1890, the defendants entered into a good and valid written contract with the plaintiffs, by means of certain letters, copies of which are hereto annexed and made a part of this declaration; that on and about said sixteenth day of October, 1890, the aforesaid contract was in full force and binding upon said parties; that on said sixteenth day of October, 1890, while the defendants were using one of said derricks, said derrick and its appliances (and especially a pair of sister hooks, which were connected with and helped to support one of the guy ropes of the derrick so in use by the defendants) broke and gave way, and by so breaking and giving way caused bodily injuries to Christopher C. Grover, from which he died, and caused great bodily injuries also to Daniel Marr and to J. H. Mills; that said breaking and giving way of said derrick and its appliances were caused by the unsound, unsafe, and defective condition of said derrick and its appliances, of which unsound, unsafe, and defective condition the plaintiffs well knew, or by the exercise of due care ought to have known; that said injured parties did not know, and by the exercise of reasonable diligence and care would not have

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known, of said unsound, unsafe, and defective condition; that the plaintiffs knew, or ought to have known, that the use by the defendants of said derrick in said condition would cause injury to persons working near said derrick, but that the plaintiffs, well knowing that the defendants were using or were about to use said derrick, negligently ordered and allowed said injured parties to work for them in a place that was dangerous, owing to said unsound, unsafe, and defective condition of said derrick and its appliances, and owing to the use by the defendants of said derrick and appliances in the condition aforesaid, and did not warn said injured parties of the danger; that the injuries aforesaid were caused by the negligence of the plaintiffs in so ordering and allowing said parties to work in a dangerous place as aforesaid, and by the negligence of the plaintiffs in not warning said injured parties of the danger of working near said derrick, while it was being operated by the defendants as aforesaid; that all these injured parties, at the time of their injuries aforesaid, were in the exercise of due care, and were regularly performing the duties of their employment, as employees of the plaintiffs; that the plaintiffs were legally liable to said injured parties for all injuries sustained by them as aforesaid; that the widow and administrator of said Grover, and the said Marr and Mills, gave notice of their said injuries to the plaintiffs, demanded payment for their injuries, and threatened to sue to recover for the same; that the plaintiffs, within twenty-eight days after said accident, paid by way of compromise, and in order to settle the aforesaid claims, and in order to secure releases from the aforesaid parties, to the widow and administrator of said Christopher C. Grover, sixteen hundred dollars; to said Daniel Marr, two hundred dollars; to said J. H. Mills, thirty-seven dollars and fifty cents; and these sums were reasonable amounts to pay in settlement of said claims. And the plaintiffs say that immediately after the aforesaid accident they gave notice to the defendants that the accident had happened as aforesaid, and that the defendants were liable therefor under their contract of indemnity; that the defendants refused to settle the claims, and the plaintiffs, before settling the claims as aforesaid, gave reasonable notice to the defendants that they intended so to settle them.

"Wherefore the plaintiffs say the defendants owe them

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$1,837.50, with interest thereon from December 1, 1890, at or before which date they demanded payment of the defendants, together with attorneys' fees and sundry expenses necessary and incidental to the aforesaid settlements."

The second count was similar to the first, except that, in the allegations of knowledge of the condition of the derrick and of negligence, the word "superintendent" (without naming him) was inserted after the word "plaintiffs."

The material portions of the copies of letters annexed to the declaration were as follows:

"Boston, June 7, 1890. Messrs. Post and McCord, New York. Dear Sirs, — We will allow you to use our engines and derricks at the Public Library at the price of one dollar for an engine and derrick for a time not exceeding one hour, and at the rate of one dollar per hour for any longer period. This arrangement to continue while we are using derricks at the Library. If any injury shall be occasioned to any person or property while you are using such engines or derricks, or as a result of such use, you are to indemnify us against any damage or expense by reason of the same, notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our employees upon the derrick or engine, may have caused or contributed to the injury. Please reply at an early date if you accept our proposition. Yours respectfully, Woodbury and Leighton."

"Boston, June 12, 1890. Messrs. Woodbury and Leighton, Boston, Mass. Dear Sirs, — Yours of June 7 is received and noted. We accept your propositions for use of derricks at the Boston Public Library, and agree to assume all responsibility. Yours truly, W. H. Howarth. Post and McCord."

"New York, June 13, 1890. To Messrs. Woodbury and Leighton, 164 Devonshire Street, Boston, Mass. Gentlemen, — In reply to your favor of 7th inst., we beg to accept your proposition contained therein for the use of engines and derricks at the Boston Public Library building, under the conditions named. Very truly yours, Post and McCord."

The defendants demurred separately to each of the counts in the declaration, and assigned the following causes of demurrer: "1. That it does not appear in the said count that the plaintiffs incurred or sustained any damage or expense, or were in any

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way damnified, by reason of any matter specified in the contract therein mentioned. 2. That it appears in the said count that the damage and expense (if any) incurred or sustained by the plaintiffs, in respect of any matter therein alleged, were caused by the negligence therein specified of the plaintiffs or their servant therein mentioned, who was not one of their employees mentioned in the said contract. 3. That it appears by the said count that the damage and expense (if any) incurred or sustained by the plaintiffs, in respect of any matter therein alleged, would not have been incurred or sustained but for the negligence therein specified of the plaintiffs, or their servant therein mentioned, who was not one of their employees mentioned in the said contract. 4. That the said count does not allege that the plaintiffs, or their superintendent, had any knowledge of the supposed unsound, unsafe, or defective condition of the derrick and its appliances, but alleges only in the disjunctive that the plaintiffs (in the first count) and their superintendent (in the second count) knew, or by the exercise of due care ought to have known, of such condition, and, without alleging any circumstances creating any duty to ascertain the condition of such derrick or its appliances, while it was used by the defendants. And as to the second count also: 5. That the said count does not specify the name of the plaintiffs' superintendent therein mentioned, or allege any excuse for such omission."

In the Superior Court the demurrer was sustained, and judgment ordered for the defendants; and the plaintiffs appealed to this court.

J. Lowell, Jr., for the plaintiffs.

J. L. Thorndike, for the defendants.

BARKER, J. 1. We construe the defendants' undertaking to be that they should indemnify the plaintiffs against any damage or expense resulting to them by reason of any injury to any person or property while the defendants were using the engines and derricks, as well as against any damage or expense which should be the result of such use. The clause "notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our [plaintiffs'] employees upon the derrick or engine, may have caused or contributed to the injury," does not limit the indemnity to damages and expenses caused by the condition of the engine,

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derrick, and appliances, or the negligence of those employed upon the derrick or engine. Its purpose and effect were to make it clear that those circumstances, which if no such clause had been inserted might have been claimed to defeat the right to indemnity, were not to impair the plaintiffs' right. The clause negatives possible exceptions which might in effect be read into the contract by the application of principles of law, unless the parties made it certain that indemnity from the result of all injuries, however occurring, was expressly stipulated. This construction of the contract disposes of the second and third causes of demurrer, which proceed upon the theory that the defendants did not undertake to indemnify the plaintiffs against injuries resulting from their own negligence, or that of any of their servants except those employed upon the derrick or engine. The contract is like one of insurance, and the doctrines applied in actions for negligence have no further application than in determining whether a liability of the plaintiff to the persons injured is well pleaded.

2. Each count states substantive facts which show that the plaintiffs sustained damage for which the defendants agreed to indemnify them, and that the defendants have broken the contract. In the first count there are allegations well pleaded that injuries were occasioned to persons named while the defendants were using one of the derricks, and substantive facts are stated which show that the plaintiffs were liable to those persons for the injuries so sustained, so that it is unnecessary to consider whether the allegation " that the plaintiffs were legally liable to said injured parties for all injuries sustained by them as aforesaid " may not be treated as a statement of a fact, rather than as a conclusion of law. These facts, from the proof of which the liability of the plaintiffs to the injured persons follows, are that they were employees of the plaintiffs engaged in work in the course of their employment; that they were injured by the breaking of the derrick and its appliances; that they were in the exercise of due care; that the breaking was due to the unsafe and defective condition of the derrick and appliances; that the persons injured did not know, and in the exercise of due care would not have known, and that the plaintiffs knew or ought in the exercise of due care to have known, this unsafe and defective

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condition; that the plaintiffs knew or ought to have known that the use of the derrick would cause injury to persons working near it, and negligently and without warning ordered and allowed the injured persons to work in a place dangerous because of the unsafe and defective condition of the derrick and its appliances. These facts show a liability at common law to the persons injured. In the second count, similar allegations, substituting the knowledge and negligence of the plaintiffs' superintendent for that of the plaintiffs themselves, show a statutory liability. Even if for the time being the derrick and its appliances were not tools or machinery of the plaintiffs, because in use by the defendants, enough is stated in each count to show a liability of the plaintiffs to the persons injured, because a breach of their duty to use due care to furnish their employees a reasonably safe place in which to work is well pleaded.

3. The second count is not open to demurrer for not stating the name of the superintendent. The substantive facts to be pleaded were that a person in the plaintiffs' service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, knew, or was negligent; his name was immaterial, and was not, in the connection in which the allegation stood, essential to the substantial certainty of the facts alleged. *Judgment set aside. Demurrer overruled.*

HENRY P. EMERSON & another *vs.* FRANCIS E. GALLOUPE & another.

Suffolk. December 6, 1892. — January 21, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Declaration of Trust — Statute of Frauds — Implied Trust — Report.

A., B., and C. agreed orally to attempt to purchase D.'s estate, at a price not to exceed $50,000. A. and B. were each to furnish one quarter, and C. one half, of the purchase money, and a syndicate, in which A. and B. were each to have one quarter interest and C. was to control one half, was to be formed for the development of the land. C. undertook to make the purchase, and, in violation of his agreement with A. and B., made the negotiation in his own behalf, and

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obtained from D. an agreement for a conveyance to C. for the sum of $42,000, of which $30,000 might remain upon mortgage. C. informed A. and B. that he had made the purchase, but concealed from them the price and the fact that the agreement was in his own name, and led them to believe that the purchase had been made pursuant to his agreement with them, and for the sum of $48,000. Giving them to understand that he was proceeding to form the syndicate, C. then drew up, in his own handwriting, and exhibited to them, a form of agreement for subscribers to a syndicate, in which the equity of the estate was capitalized at $18,000, and the further sum of $2,000 was added for the expense of constructing a street and other incidental expenses, and in which of the $20,000 thus made up one fourth was allotted to each A. and B. This form of agreement contained the name of C., in his own handwriting, as one of the syndicate, but was not otherwise signed, and later he refused to carry out its conditions and destroyed the paper. A. and B. then brought a bill in equity against C. and D. to declare a trust. Upon these facts, the Superior Court ruled that there was no sufficient writing to constitute a valid agreement between C. and the plaintiffs, nor any sufficient declaration of trust; and entered a final decree dismissing the bill without costs to C. *Held*, upon a report of the case, that the decree should be affirmed.

BILL IN EQUITY, filed in the Superior Court on October 26, 1891, by Henry P. Emerson and Frank D. Allen, against Francis E. Galloupe and Francis W. Breed, to declare a trust. The case was heard by *Mason*, C. J., and reported, at the request of the plaintiffs, for the determination of this court. The facts appear in the opinion.

G. A. O. Ernst, for the plaintiffs.

J. B. Lord, for the defendants.

BARKER, J. The plaintiffs and the defendant Galloupe orally agreed to attempt to purchase the defendant Breed's estate at a price not to exceed fifty thousand dollars. Each plaintiff was to furnish one quarter, and Galloupe one half, of the purchase money, and a syndicate, in which the plaintiffs were each to have one quarter interest and Galloupe was to control one half, was to be formed for the development of the land. Galloupe undertook to make the purchase, and, in violation of his agreement with the plaintiffs, made the negotiation in his own behalf, and obtained from Breed an agreement for a conveyance to himself for the sum of forty-two thousand dollars, of which thirty thousand dollars might remain upon mortgage. He informed the plaintiffs that he had made the purchase, but concealed from them the price and the fact that the agreement was in his own name, and led them to believe that the purchase had been made pursuant to his agreement with them, and for

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the sum of forty-eight thousand dollars. Giving them to understand that he was proceeding to form the syndicate, he then drew up, in his own handwriting, and exhibited to them, a form of agreement for subscribers to a syndicate, in which the equity of the estate was capitalized at eighteen thousand dollars, and the further sum of two thousand dollars was added for the expense of constructing a street and other incidental expenses, and in which of the twenty thousand dollars thus made up one fourth was allotted to each of the plaintiffs. This form of agreement contained the name of Galloupe, in his own handwriting, as one of the syndicate, but was not otherwise signed; and later he refused to carry out its conditions and destroyed the paper. Upon these facts, the presiding justice ruled that there was no sufficient writing to constitute a valid agreement between Galloupe and the plaintiffs, nor any sufficient declaration of trust; and entered a final decree dismissing the bill without costs to Galloupe.

Galloupe repudiated and violated his agreement with the plaintiffs from the outset, and made the negotiation with Breed for himself alone. He has not acted as trustee for the plaintiffs, nor as their agent, but solely for himself; the plaintiffs have no rights founded on anything which he has done for them, but must recover, if at all, on the fact that, having agreed to act in part for them, he has violated that agreement and acted solely for himself. The agreement was within the statute of frauds, and no trust in the equitable title acquired by Galloupe can be enforced, unless a trust arose or resulted by implication of law. Pub. Sts. c. 78, § 1, cl. 4; c. 141, § 1. It is contended that such cases fall within the exception of trusts which may arise or result by implication of law. But we cannot construe that exception as extending to a trust which arises from the plain words of a contract, merely because the words promise it by implication, instead of setting it forth at needless length. When a man promises to buy land for another, he promises to hold it for that other after he has bought it, and it makes no difference in the applicability of Pub. Sts. c. 141, § 1, whether the latter promise is uttered in separate words or not. *Collins* v. *Sullivan*, 135 Mass. 461, and cases cited. *Bailey* v. *Hemenway*, 147 Mass. 326, 328. While there is some conflict of

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authority upon this point, we are content with the doctrine as settled here by the cases cited. See *Burden* v. *Sheridan*, 36 Iowa, 125; *Nestal* v. *Schmid*, 2 Stew. 458; *James* v. *Smith*, [1891] 1 Ch. 384 (Kekewich, J.); *S. C.* 65 L. T. (N. S.) 544; *Rose* v. *Hayden*, 35 Kans. 106; *Ryan* v. *Dox*, 34 N. Y. 307; *Heard* v. *Pilley*, L. R. 4 Ch. 548.

The single question presented by the report is whether the document drawn up by Galloupe, and exhibited to the plaintiffs, was a signed declaration of trust. The language of the report will not justify us in holding, either that it was signed by Galloupe, or that it contained any admission that the plaintiffs were jointly interested in the purchase. The document is found to have been merely a form of agreement for subscribers to a syndicate; in other words, a proposal consistent with the claim of Galloupe that he was the only person then interested in the purchase. The fact that it has been destroyed by Galloupe gives us no power to change the finding of facts reported. It is to be presumed that the justice who made the finding gave due weight to every circumstance which would tend to show that the document was a sufficient memorandum; but when he was unable to find more than that an unsigned form of agreement for subscribers to a syndicate had been exhibited, he could not do otherwise than rule as he did. There is abundant reason why Galloupe should not have costs.

Decree affirmed.

COMMONWEALTH *vs.* JOHN D. WRIGHT & another.

Dukes County. November 21, 1892. — January 23, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Fugitive from Justice — Constitutional Law — Assault — Evidence — Officer — Arrest without Warrant — Possession of Short Lobsters with Intent to sell — Statute.

A fugitive from justice, who has been surrendered by another State under the Const. U. S., Art. IV. § 2, cl. 2, upon a requisition from the Governor of this Commonwealth, may be tried here for an offence other than that specified in

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the requisition, although committed before the fugitive was demanded, without first giving him a reasonable opportunity to return to the State from which he was extradited.

At the trial of an indictment for an assault upon A., committed while he was attempting to board the defendant's boat for the purpose of arresting him, and after he had said to the defendant, "I am a State officer, and am coming on board," A. may testify that, at the time of the assault, he was a district police officer and a deputy fish commissioner.

A district police officer and deputy fish commissioner has no authority to arrest without a warrant a person suspected of having in his possession short lobsters with intent to sell them.

FIELD, C. J. This is an indictment for an assault and battery. In the first count the defendants are charged with an assault and battery upon William H. Proctor, and in the second, with an assault and battery upon Peter Nelson. We infer that the defendants were found guilty upon both counts, although this does not appear in the papers before us. The exceptions recite: "At the trial it was claimed by the defendants, and admitted by the Commonwealth, (subject to all objections as to the competency of the evidence,) that the defendants were brought from Newport, in the State of Rhode Island, where they resided, to Edgartown, in said Dukes County, upon the requisition of the Governor of Massachusetts upon the Governor of Rhode Island, wherein they were charged with an assault with intent to kill upon the said Proctor and Nelson. The defendants claimed, and asked the court to rule, that they could not be tried upon the present indictment, but only for the offence for which they were extradited, and that they should be discharged. The court declined so to rule and to discharge the defendants, and ruled that the offer of proof was incompetent in bar of the prosecution of the defendants. The defendants objected, and excepted to the above ruling and refusal to rule." The copy of the complaint before the trial justice which has been sent to us, and on which the defendants were bound over for trial by the Superior Court, contains one count only, and it is for an assault with dangerous weapons upon William H. Proctor, with intent to kill and murder him, he being then a member of the district police, engaged in the execution of the duties of his office, as the defendants knew. There is no charge of an assault of any kind upon Nelson. We suppose that this is the complaint on which the requisition is founded, although the exceptions

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recite that the assault described in the requisition was with intent to kill "said Proctor and Nelson." We have not been furnished with a copy of the requisition. An assault with a dangerous weapon with intent to murder is punishable "by imprisonment in the State Prison not exceeding twenty years"; Pub. Sts. c. 202, § 23; it is, therefore, a felony. Pub. Sts. c. 210, § 1. A simple assault and battery is a misdemeanor. Upon an indictment for an assault with intent to murder, a defendant can be convicted of a simple assault, and it is conceded in this case that both the indictment and the complaint were supported by the same evidence, and were intended to include the same acts of the defendants. If the complaint, however, contained no charge of an assault upon Nelson, then the defendants have been tried for an assault not included in the complaint. The contention of the defendants is that they could not be tried for any other crime committed before they were surrendered than that for which they were demanded, according to the decision in *United States* v. *Rauscher*, 119 U. S. 407, as no opportunity was afforded them to return to Rhode Island after they were delivered up on the requisition, except on their recognizance to appear in the Superior Court, and to abide the order and sentence of that court. The contention is that the law is the same in extradition between States of the United States as between the United States and foreign nations. The first contention of the Attorney General is, that, by proceeding to trial upon a plea of not guilty, the defendants have waived any such defence. It is true that, if the defendants were entitled to be discharged from arrest upon the indictment under the rule of *United States* v. *Rauscher*, this is not strictly a defence to the indictment. An indictment could properly have been found against the defendants while they were in the State of Rhode Island, and they could properly be tried on this indictment at any time when they could be lawfully arrested and held to answer to it. They might voluntarily come within this Commonwealth and be arrested here, or be brought here for trial by a requisition for the identical crime charged in the indictment. The defendants could not be entitled to a verdict and judgment of not guilty on this indictment because they had been unlawfully held in arrest to answer to it, and thus be thereafter free from any prosecution for the offence by pleading

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this judgment in bar of another prosecution. If the facts and the law are as the defendants contend, they were entitled to be discharged from custody until they had had a reasonable opportunity to return to Rhode Island. This question, we think, could properly have been raised by a motion or petition to the court, and, if the facts were disputed by the Commonwealth, we think that it was for the court to find the facts. In some cases a special plea has been allowed, but it seems to us that in the nature of things it is not strictly a plea to the indictment, but an application to the court to be discharged from custody, which should be tried and determined by the court in much the same manner as a similar application on a writ of habeas corpus. See *United States* v. *Rauscher*, 119 U. S. 407; *Ex parte McKnight*, 28 N. E. Rep. 1034; *Blandford* v. *State*, 10 Tex. App. 627; *Commonwealth* v. *Hawes*, 13 Bush, 697. *State* v. *Vanderpool*, 39 Ohio St. 273. *United States* v. *Watts*, 8 Sawyer, 370.

We deem it unnecessary to determine, however, whether the defendants have seasonably and properly taken this objection, because we are of opinion that the law is not as the defendants contend.

The decision in the *United States* v. *Rauscher* rests upon the construction of the Treaty of 1842 between Great Britain and the United States, and of the statutes of the United States passed to carry into effect treaties or conventions of extradition with foreign countries, now found in the U. S. Rev. Sts. §§ 5270, 5272, and 5275. Before this decision the government of the United States had demanded of the government of Great Britain the extradition of Ezra D. Winslow, and the correspondence of the two governments had disclosed that they did not agree upon the construction to be put upon the Treaty of 1842. A full account of this discussion is found in Moore on Extradition, § 150 *et seq.*, and in Spear on Extradition, (2d ed.) 163.

The result of the controversy was that the United States refused to give any assurance to the British government that Winslow, if surrendered, would not be tried for other offences than those specified in the demand for extradition without first giving him an opportunity to return to Great Britain, and therefore Great Britain, in accordance with her own statutes concerning extradition, refused to surrender him. The crimes charged

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against Winslow were not offences against the laws of the United States, but against the laws of the Commonwealth of Massachusetts. One ground on which the Secretary of State of the United States refused to give the assurance required by Great Britain was, that "neither the President, nor any officer of the Federal government, has power to control or to dismiss the prosecution in Winslow's case, or in any case where the offence is against the laws of one of the States, and could not give any stipulation or make any arrangement whatever as to the offences for which he should be tried when returned to the justice of the State against whose laws he may have offended." Moore on Extradition, § 150. The treaties of the United States, and the statutes of the United States passed to carry such treaties into effect, are the law of the land, and are binding upon all State courts, as well as upon the courts of the United States. If it were only a violation of good faith on the part of the United States to procure the extradition of fugitive criminals from a foreign country on a charge of one crime, and then to try them for another, this would not enable a criminal to procure his discharge by the courts as a matter of right; but the President of the United States, through the Attorney General of the United States, might, if he saw fit, direct a discontinuance of any such prosecution in the courts of the United States. It was however, to say the least, doubtful whether the President had any power whatever over prosecutions in State courts for offences against the laws of the State. It was thus possible for the State authorities to involve the government of the United States in serious controversies with foreign nations unless it was the law of the land that an alleged criminal surrendered by a foreign country, charged with one crime, could not be tried for another in any court without first having had an opportunity afforded him to return to the place from which he had been surrendered. This consideration had some weight with the Supreme Court of the United States in *United States* v. *Rauscher*. The principal grounds of the opinion of the majority of the court in that case were, that the Treaty of 1842 did not include all crimes, but only certain specified crimes; that no duty of delivering up fugitive criminals rests upon a foreign nation except by convention, and that the language of the treaty implied that criminals should not be surren-

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dered except for the crimes specified; that the explicit language of § 5275 of the Revised Statutes of the United States, viz. that "the President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences, and for a reasonable time thereafter," also implied that he was to be tried only for the specific offence for which he had been surrendered, unless he voluntarily remained within the United States; and that the modern practice of most foreign nations, and the opinion of the most recent text writers on international law, tended to support this view of the duty imposed by a treaty of extradition, and of the rights acquired by the accused under it and the statutes passed to carry such treaties into effect.

Upon the question whether the same rule should be applied to what has been called extradition between States of the United States under the Constitution of the United States, the decisions are not uniform, but the weight of authority seems to be that the rule is not applicable. *People* v. *Cross*, 135 N. Y. 536. *Ham* v. *State*, 4 Tex. App. 645. *State* v. *Stewart*, 60 Wis. 587. *Waterman* v. *State*, 116 Ind. 51. *Contra*, *State* v. *Hall*, 40 Kans. 338; *Ex parte McKnight*, 28 N. E. Rep. 1034. *In re Cannon*, 47 Mich. 481, and *Compton* v. *Wilder*, 40 Ohio St. 130, relate to an arrest on civil process of the person surrendered. This question has been elaborately discussed in Moore on Extradition, § 642 *et seq.*, and in Spear on Extradition, (2d ed.) 525 *et seq.*, and all the authorities up to the time of the publication of these books are there cited. These text writers reach opposite conclusions.

If the true construction of Art. IV. § 2, cl. 2, of the Constitution of the United States is that "the State having jurisdiction of the crime" cannot try the person delivered up for another crime than that for which he has been demanded, if committed before the demand was made, without it first gives him a reasonable opportunity to return to the State from which he has been demanded, then it is the law of the land, and the State courts must obey it. But this clause, we think, is not subject to any

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such construction. The clause includes every crime in the State from which the person charged with crime has fled. This has been uniformly the construction put upon it by the courts. *Kentucky* v. *Dennison*, 24 How. 66. *Brown's case*, 112 Mass. 409. Even if this clause should be held to include only such crimes as were known to the common law, or to the States when the Constitution of the United States was adopted, it would include simple as well as aggravated assaults. At the time when the Constitution was adopted, the courts of England and of this country, so far as we are aware, tried all accused persons brought before them charged with crimes within their jurisdiction, without regard to the legality of the methods whereby the accused had been arrested and brought before the courts. Now, when a person who has committed a crime in one State, and has fled to another or to a foreign country, has been brought back by force and without right, it has been held that the courts cannot discharge him on his application. This, it is true, involves no federal question, but the cases are cited in *Ker* v. *Illinois*, 119 U. S. 437, and *Mahon* v. *Justice*, 127 U. S. 700. The decisions are that this is a matter for the executive departments of the governments, and not for the courts, and that if there has been a breach of good faith the criminal has thereby acquired no right to be discharged by the court. In *Kentucky* v. *Dennison*, it was decided that the clause of the Constitution we are considering was declaratory of a moral duty imposed on the States, and that there was no power in the courts of the United States to enforce it, or the statutes of the United States passed in pursuance of it.

A State ought undoubtedly to exercise good faith towards another State in proceedings under this clause, and it always is in the power of the prosecuting officers of a State to enter a *nolle prosequi* on an indictment against a criminal whose presence has been obtained in violation of law. In the present case, it may be said that, as the duty of the State of Rhode Island was to surrender the defendants if charged with any crime committed in Massachusetts, there seems to be no want of good faith in prosecuting them for the criminal offence included in the requisition, even although the evidence submitted to the grand jurors did not convince them that the defendant had committed the crime with the aggravations alleged in the complaint. If the

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count in the indictment charging an assault upon Nelson is an additional offence, the evidence shows that it was a part of the same transaction alleged in the complaint. We find, however, nothing in the history of the insertion of this clause in the Constitution of the United States which tends to show that the doctrine contended for by these defendants was in the minds of those who framed the Constitution, or was considered by the people who adopted it. If we assume, notwithstanding the decision in *Kentucky* v. *Dennison*, *ubi supra*, that the statutes of the United States passed for the purpose of providing the methods whereby this clause of the Constitution may be carried into effect are to be considered in any proper sense as laws, there is nothing in them which purports to give to the person to be delivered up the right to return to the State where he was found before he can be tried for any other crime than that for which he was demanded, and it has not been contended that Congress by statute could add to or take from the rights and duties of the States under this clause of the Constitution. See U. S. Rev. Sts. §§ 5278, 5279.

If we turn to our own statutes on the subject, (Pub. Sts. c. 218, §§ 1–11,) we find there nothing which seems to limit the power of the courts of the Commonwealth, or which expressly or impliedly requires these courts to discharge from arrest criminals surrendered under this clause of the Constitution, if put on trial for other offences than the offence for which they were delivered up, unless an opportunity has been afforded them to return to the State where they were found. Under this clause of the Constitution, fugitive criminals from one State have no right of asylum in another State, whether the crime be political or non-political, whatever its nature or degree; and the reasons which influenced the Supreme Court of the United States in the decision of *United States* v. *Rauscher* seem to have little application to the rendition of fugitives from justice by one State to another under the Constitution. We doubt, moreover, whether the doctrines of international law which that court invoked in that case were recognized as a part of the duty of nations towards each other when the Constitution of the United States was adopted. However that may be, we are of opinion that the Constitution makes it the duty of one State to surrender fugitives

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from justice when charged with any crime committed in another State, and imposes no limitation upon the right of the State to which they are surrendered to try them when surrendered for other offences than those specified in the requisition, although the offences were committed before the fugitives were demanded.

The crime which the defendants were suspected of having committed when Proctor went on board their sloop, as we understand the exceptions, was having in their possession what are called short lobsters, with intent to sell them. See Pub. Sts. c. 91, § 84; St. 1884, c. 212, § 1; St. 1887, c. 314. No question is made that the place where the sloop was lying and the place where the traps were found were within the town of Gosnold in this Commonwealth. The special statutory authority of the Commissioners of Inland Fisheries, or their deputies, and of the members of the district police, to enforce the provisions of the statutes we have cited, is found in St. 1884, c. 212, §§ 3, 4; St. 1885, c. 256, § 1; St. 1888, c. 389, § 2. The manner of the appointment of the district police, and their general powers, are shown in Pub. Sts. c. 103, §§ 1, 2. See St. 1885, c. 131; St. 1887, c. 256; St. 1888, cc. 113, 389, 426, § 13; St. 1891, cc. 302, 357, § 6. In general, the district police have "all the powers of constables (except the service of civil process), police officers, and watchmen." Pub. Sts. c. 103, § 2. The Commissioners on Inland Fisheries are appointed by the Governor, by and with the consent of the Council, and they may act personally or by deputy. Pub. Sts. c. 91, §§ 2, 3. The deputies, as we understand, are appointed by the commissioners, as deputy sheriffs are appointed by the sheriff.

William H. Proctor was allowed to testify, against the defendants' objection, that he was, at the time of the assault, a district police officer and a deputy fish commissioner. We think that the evidence was competent. Whether standing alone, without evidence that he had previously publicly performed the duties of each of these offices, it would be sufficient to warrant the jury in finding that he actually held these offices by legal appointment, is a question, we think, not raised by the exceptions. *Commonwealth* v. *Kane*, 108 Mass. 423. *Commonwealth* v. *Tobin*, 108 Mass. 426. Greenl. on Ev. §§ 83, 92. There was perhaps evidence that the defendants knew or believed

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that Proctor was an officer engaged in enforcing the laws relating to lobsters, and that for this reason they sought to avoid him, even before he stated, "I am a State officer, and am coming on board." The defendants were not indicted for an assault upon an officer, but if Proctor was an officer, and the defendants knew it, and if he had the right to arrest them without a warrant, they lawfully could make no resistance to the arrest. If Proctor was not an officer, or if, being an officer, he had no right to arrest the defendants without a warrant, they could use reasonable force in preventing an arrest. It is conceded that Proctor did not have a warrant, and that he testified that, when he went on board the sloop, he intended to arrest the defendants. It has been argued that Proctor, either as deputy fish commissioner or district police officer, or both, had a right to search the sloop for lobsters, under St. of 1885, c. 256. The counsel for the defendants argues that this provision concerning the right of search is unconstitutional. It appears, however, that Proctor did not go on board the sloop for the purpose of searching for lobsters, but of arresting the defendants; and it does not appear that he represented to the defendants that he boarded the sloop to search for lobsters. We think, therefore, that this provision of the statutes cannot be invoked for his protection, and that it is unnecessary to consider it.

At the argument in this court, the counsel for the defendants waived the contention that the statute was unconstitutional which makes the possession of short lobsters with intent to sell them a crime. His principal contention was, that, even if the jury found that the defendants were in possession of short lobsters with intent to sell them, Proctor either as deputy fish commissioner or as district police officer had no right to arrest them without a warrant. There is no statute authorizing such an arrest, for we do not consider St. 1885, c. 220, § 6, as applicable to the case. It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that therefore an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of

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opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute. *McLennon* v. *Richardson*, 15 Gray, 74. *Commonwealth* v. *O'Connor*, 7 Allen, 583. *Scott* v. *Eldridge*, 154 Mass. 25. *People* v. *McLean*, 68 Mich. 480. 1 Bennett & Heard's Leading Cas. 201. 1 Bish. Crim. Proc. (3d ed.) §§ 166–183. *Commonwealth* v. *Tobin*, 108 Mass. 426. The Legislature has often empowered officers to arrest without a warrant for similar offences, which perhaps tends to show that, in its opinion, no such right exists at common law. See, for example, St. 1886, c. 276, § 8; Pub. Sts. c. 100, § 43; c. 203, §§ 100, 104; c. 207, §§ 41 and 43. If Proctor had no right to arrest the defendants without a warrant, and he boarded the sloop for that purpose, he was a trespasser, and the question for the jury would be whether the defendants used excessive force in defending themselves and their property. *Commonwealth* v. *Clark*, 2 Met. 23. *Brown* v. *Gordon*, 1 Gray, 182. *Commonwealth* v. *Cooley*, 6 Gray, 350. The court should have ruled that Proctor, even if he held the offices he claimed to hold, had no authority, under the circumstances shown, to arrest the defendants without a warrant.

*Exceptions sustained.**

J. W. Cummings, for the defendants.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* BRIDGET HURLEY.

Middlesex. January 30, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Illegal Keeping for Sale — Motion for Continuance — Evidence.

Where there are two shires of a county, in each of which the Superior Court sits alternately, no exception lies to the refusal of the presiding judge to continue the trial of a criminal case from one place to the other, at a sitting held three months later, on the ground that the defendant is a resident of the latter place, to the police court of which the complaint in the case is addressed.

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* See *Lascelles* v. *Georgia*, 13 U. S. Sup. Ct. Rep. 687.

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At the trial of a complaint for the illegal keeping for sale of intoxicating liquors, evidence that the defendant, a woman, upon her arrival at the police station after her arrest, took from her garments and threw away a lager beer bottle containing whiskey, is competent.

At a trial of a complaint for the illegal keeping for sale of intoxicating liquors, the government introduced evidence, without objection, that drunken men were seen going into and coming from the defendant's premises at other times than that specified in the complaint; and the defendant introduced evidence that intoxicated persons came frequently upon his premises, which were unfenced from the public street upon which they opened. The judge submitted the whole evidence to the jury, with instructions that they might consider any of the evidence as to acts which occurred within thirty days prior to the date of the complaint tending to establish the charge therein. *Held*, that the defendant had no ground of exception.

At the trial of a complaint for the illegal keeping for sale of intoxicating liquors, there was evidence that the defendant, who was a woman and kept a grocery, upon her arrival at the police station after her arrest, took from her garments and threw away a lager beer bottle containing whiskey; that police officers found on her premises that day three bottles, in one of which there was half a teaspoonful of whiskey; that intoxicated persons were seen going into and coming from her premises at other times than that specified in the complaint; and there was other evidence not reported tending to establish the charge in the complaint. The judge declined to rule, as requested by the defendant, that there was not sufficient evidence to sustain the charge in the complaint, and that the defendant was entitled to an acquittal. *Held*, that the defendant had no ground of exception.

A police officer may testify, on the trial of a criminal case, to material facts within his knowledge, although he was acting unlawfully when the facts came to his knowledge.

COMPLAINT to the Police Court of Lowell, for unlawfully exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same in this Commonwealth, on February 7, 1892, at Lowell. Trial in the Superior Court, before *Fessenden*, J., who allowed a bill of exceptions, in substance as follows.

The case was tried at the June sitting, 1892, of the court in East Cambridge; and on July 2, 1892, the defendant filed a motion that, as the complaint was made to the Police Court of Lowell, which city was one of the shires of the county, and as the defendant resided in that city, the trial of the case be continued to the sitting of the court for criminal business at Lowell in October, 1892. This motion was overruled; and the defendant excepted.

There was evidence given by police officers of Lowell tending to show the following facts. The defendant was the proprietor of a grocery on Coburn Street, in Lowell, and was also at that place a retail dealer in coal and wood. The premises

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consisted of a two-story house; and the defendant occupied five rooms thereof on the lower floor, two of which were used by her for the prosecution of her business. On Sunday morning, February 7, 1892, three of said officers visited the premises, and found the defendant engaged in selling groceries. The officers arrested her for the illegal selling of the groceries, watched all her movements in the house, and thereupon took her to the police station in a wagon. Immediately after the defendant alighted from the wagon near the police station, she took from her garments and threw away a lager beer bottle said to contain whiskey, which the defendant denied. The officers found on the premises of the defendant on that day three bottles, in one of which there was half a teaspoonful of whiskey. The defendant asked the judge to rule that the evidence of throwing away the bottle at the police station (the same being at least one half of a mile from the defendant's premises) should be rejected and disregarded by the jury; but the judge declined so to rule, and instructed the jury that the evidence was competent and admissible, and might be considered by them in determining their verdict; and the defendant excepted. There was evidence offered by the government tending to show that in the month of January, 1892, on four of the Sundays in the month one or two men were arrested on each day by one of the officers for drunkenness; and that the defendant's premises opened upon a public street known as Coburn Street. There was further evidence tending to show that in the immediate neighborhood of the premises there were two public bar-rooms in full operation; and that the drunken men might, and probably did, obtain their liquor in one or both of the bar-rooms. There was also evidence tending to show that, at some time prior to said February 7, 1892, two men were seen coming from the defendant's premises in a partially intoxicated condition, but not sufficiently intoxicated to justify the officer in making an arrest for drunkenness; and that at other times intoxicated people were seen going into and coming out of the defendant's premises. The defendant testified, and also a witness for the defendant, that persons in an intoxicated condition came frequently upon a portion of her premises, the same being wholly unfenced from the public street, and that the defendant had

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requested at various times some of the police officers to remove the intoxicated persons from her premises. The judge ruled that the jury might consider any of the above evidence, or any other evidence tending to establish the charge in the complaint, as to acts which occurred within thirty days prior to February 7, 1892; and the defendant excepted. There was other evidence tending to establish the charge in the complaint.

At the close of the evidence, the defendant asked the judge to rule that there was not sufficient evidence to sustain the charge in the complaint, and that the defendant was entitled to a verdict of acquittal. The judge declined so to rule, and submitted the case to the jury; and the defendant excepted.

The government offered evidence that two of the officers who visited the defendant's premises on February 7, 1892, were known as inspectors, or as "seizure officers"; and that they acted in that capacity on that day, having with them a warrant to search the premises for the purpose of endeavoring to find thereon intoxicating liquors exposed and kept for sale in violation of law. The defendant requested the judge to reject the evidence, and to instruct the jury to disregard the same; and to rule that the inspectors had no lawful right to visit the premises on February 7, 1892, the same being the Lord's day. The judge declined so to rule; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. F. Manning, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

ALLEN, J. 1. No legal or constitutional right of the defendant was violated by the refusal of the presiding justice to postpone the trial until the court should be held three months afterwards in Lowell. *Commonwealth* v. *Donovan*, 99 Mass. 425. *Commonwealth* v. *Drake*, 124 Mass. 21.

2. The testimony that the defendant took from her garments and threw away a lager beer bottle containing whiskey was competent for the jury to consider. The words "said to contain whiskey" we interpret to mean that some witness testified that the bottle contained whiskey.

3. Certain evidence was admitted, without objection, that drunken men were near the defendant's premises at other times

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than that specified in the complaint; and the defendant introduced evidence tending to explain the same in a way consistent with her innocence. The whole was submitted to the jury, with instructions that they might consider any of the testimony as to acts which occurred within thirty days prior to the date of the alleged offence, which tended to establish the charge in the complaint. This instruction was right. *Commonwealth* v. *Finnerty*, 148 Mass. 162.

4. The evidence was no doubt sufficient to warrant a conviction. If the evidence reported were questionable, there was other evidence not reported.

5. The inspectors might testify to material facts within their knowledge, even though they were acting unlawfully, (which we do not intimate was the fact,) when the facts came to their knowledge. *Commonwealth* v. *Tibbetts*, 157 Mass. 519.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN COLLIGAN.

Norfolk. January 30, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Assaulting Officer in Discharge of Duty — Trial.

At the trial of a complaint for an assault upon an officer while in the discharge of his duty, the officer testified, without objection, that he was assaulted while attempting to arrest the defendant; and that he had a capias at that time, and so stated to the defendant. The capias was not produced by the government, although called for by the defendant. The judge refused to rule, as requested by the defendant, that, in the absence of the capias, the evidence for the government did not sustain the complaint. *Held*, that the defendant had no ground of exception.

COMPLAINT to the District Court of East Norfolk, for an assault and battery upon George O. Langley, while in the discharge of his duty as a constable.

At the trial in the Superior Court, before *Sherman*, J., the government introduced the evidence of Langley, who testified, among other things, substantially as follows: "I went to the court and got a capias, and went to arrest the defendant, and,

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while attempting to make the arrest, the defendant made an assault on me." On cross-examination, the witness was asked if he stated that he had a capias when he made the arrest, and he replied, "I did." He was then asked to produce it, or a copy of it, to which he replied, "It is in the lower court." The government failing to put in the capias, the defendant asked the judge to rule that, in the absence of the capias, the evidence for the government did not sustain the complaint. The judge refused so to rule; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. E. Tirrell, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

HOLMES, J. The fact that the officer had a document with him when he made the arrest was matter *in pais*, and ordinarily would be testified to, as it was in this case, by words identifying the instrument. If the identification of it by parol as a capias, and the implication that it ran against the defendant, in extreme strictness, could have been objected to as reciting the contents of the writ, no such objection was taken, and the case could not be taken from the jury at a later stage because the capias was not produced. *Niles* v. *Patch*, 13 Gray, 254, 259.

Exceptions overruled.

WILLIAM T. BENSON *vs.* COMMONWEALTH.

Suffolk. January 30, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Writ of Error — Trial on Indictment for Distinct Felonies of same Nature — General Verdict — Time — Presumption.

It is not error in a criminal case, that the defendant was tried upon one indictment for four distinct felonies of the same nature, and was convicted of three of the charges by a general verdict upon three counts.

Where a person was tried upon an indictment in four counts for poisoning, and was convicted by a general verdict upon three counts, no inference against the verdict is to be drawn, on a writ of error, because, at the time when he was alleged in the indictment to have committed the offences charged in two of these counts, he was confined in jail.

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If a person was tried upon an indictment of four counts for poisoning, the acts charged in the third and fourth counts being alleged to have been committed on the same day, upon the last three of which counts he was convicted, this court is not bound to assume, on a writ of error, either that a single offence only was charged, or that the third and fourth counts were different descriptions of the same act.

WRIT OF ERROR, to reverse a judgment rendered for the Commonwealth, at the May sitting, 1889, of the Superior Court for the county of Dukes County, upon an indictment for poisoning. Plea, *in nullo est erratum*. The material facts appear in the opinion.

J. S. Cobb & J. F. Pickering, for the plaintiff in error.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

BARKER, J. The first five assignments of error are mere statements of conclusions of law, alleging that the return of a general verdict of guilty on the last three counts of the indictment, the receiving and recording of that verdict, the judgment and sentence, and the issuing of the warrant, and the plaintiff in error's commitment to the state prison, and his confinement, are all erroneous. The sixth assignment alleges the fact that since his arrest, on February 26, 1889, he was in continuous confinement in the county jail until June 4, 1889, and thereafter in the state prison. The seventh alleges that his sentence was erroneous because the verdict was void, for the reason that the plaintiff in error was in confinement in the jail on March 12, 1889, when by the verdict he is found to have committed the acts charged in the third and fourth counts. The offences charged are felonies, and the plaintiff in error contends that, if two or more felonies are charged in one indictment, the prisoner cannot be tried upon it for more than one offence, and that the prosecutor must be compelled to elect on which charge he will proceed, or the indictment must be quashed. Such is neither the law nor the practice in this Commonwealth. On the contrary, this court has often held that distinct felonies, if of the same general description, and if the mode of trial and the nature of the punishment are the same, may be charged in the same indictment, and may be tried together, unless the court shall direct the government to proceed upon one count or set of counts only, if it sees any danger that the defendant will be

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embarrassed by the multiplicity of the charges against him. *Commonwealth* v. *Costello*, 120 Mass. 358, 366, and cases cited. *Pettes* v. *Commonwealth*, 126 Mass. 242, 245. *Commonwealth* v. *Jacobs*, 152 Mass. 276, 281, and cases cited. *Commonwealth* v. *Taber*, 155 Mass. 54. And it has also been distinctly held, that whether the charges shall be tried separately or together is a matter within the discretion of the presiding judge, and that if a general verdict of guilty is returned upon counts charging distinct offences, and no inquiry is made of the jury as to the counts upon which they found their verdict, the general verdict of guilty will apply to each count. *Commonwealth* v. *Carey*, 103 Mass. 214. See also *Commonwealth* v. *Foster*, 122 Mass. 317, 323. The record, therefore, discloses no error in the fact that the plaintiff in error was tried upon one indictment for four distinct felonies, and was convicted of three of the charges by a general verdict upon three counts.

The plaintiff in error further contends that it appears from the record that it was impossible for him to have committed the offences charged in the third and fourth counts, because, at the time when it is charged that he committed them, he was confined in the county jail. Whether, if this contention is sound, his sentence would not still be legal, because within the limit which could be imposed for the offence of which he was convicted under the second count, it is not necessary to consider. For it is familiar law that the averment of time in an indictment for offences such as those charged here is purely technical, and need not be proved as alleged; *Stevens* v. *Commonwealth*, 4 Met. 360, 370; *Commonwealth* v. *Hitchings*, 5 Gray, 482, 485; *Commonwealth* v. *Jacobs*, 9 Allen, 274; *Commonwealth* v. *Dacey*, 107 Mass. 206; *Commonwealth* v. *Sego*, 125 Mass. 210; and when the record comes up on a writ of error it does not legally follow from the conviction that the day laid was the day proved. *Stevens* v. *Commonwealth*, *ubi supra*. On the contrary, after a verdict of guilty, the presumption is that the evidence was such, both in weight and character, as to authorize a conviction.

We are aware that this court in *Commonwealth* v. *Hitchings*, 5 Gray, 482, 485, speaking of the averment of time, said that "on a motion in arrest of judgment, that fact, like all others, is to be taken to be truly stated." But all that was necessary for the

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decision of the point then under discussion was, that, after conviction, no inference against the validity of the judgment could be drawn from the doctrine that the averment of time was merely technical. That decision was *per curiam*, and was not intended to overrule the previous statement of the court, in *Stevens* v. *Commonwealth*, *ubi supra*, and is not to be considered as authority for the position that, on a writ of error, the time laid in the charge must be taken as the actual date to which the proof adduced at the trial referred. No inference against the verdict is to be drawn upon the theory that the day proved was the day alleged, unless that inference would also be drawn if it appeared upon the record that the day proved was any other day which might have been legally proved under the charge.

It ought also, perhaps, to be added, that there is no legal impossibility that the offences charged in the third and fourth counts should have been committed within the precincts of the jail, and that if, upon the theory of the plaintiff in error, the technicality which he invokes to show that such was the charge should compel us so to hold, similar reasoning would require us to hold that the record also shows that he was proved guilty of those offences by sufficient evidence.

The plaintiff in error further contends that the four counts charge but one offence, and also that, while the third and fourth counts charge but one offence, that charged in the second is distinct from the one charged in the third and fourth, and that in either event he has been convicted of more offences than he was charged with by the indictment. See *Commonwealth* v. *Fitchburg Railroad*, 120 Mass. 372. These contentions are, of course, inconsistent with each other, and also with the theory on which he has founded his chief argument, but they must, nevertheless, be considered. It is enough to dispose of them to say that we are not bound to assume, either that but a single offence was charged, or that the third and fourth counts were different descriptions of the same act; *Carlton* v. *Commonwealth*, 5 Met. 532, 534; *Bushman* v. *Commonwealth*, 138 Mass. 507; and that we find nothing in the record to indicate that either was the fact. *Judgment affirmed.*

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COMMONWEALTH vs. SAMUEL F. BROWN.

Suffolk. January 30, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Police Court — Special Justice — Record — Complaint — Warrant — Motion to Dismiss — Motion in Arrest of Judgment.

If the record in a criminal case shows that, in all the different stages of the proceedings therein, the police court to which the complaint was made was held by the special justice, in the absence and at the request of the justice, it is no ground for dismissal of the complaint and in arrest of judgment, after a verdict of guilty, that the complaint was addressed to the justice of the court, and that the warrant bore his seal.

COMPLAINT to the justice of the Police Court of Chelsea, alleging that the defendant, on March 29, 1892, at Chelsea, unlawfully exposed and kept for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth. In the Superior Court, upon appeal, after a verdict of guilty, the defendant moved to dismiss the complaint, and in arrest of judgment. The motions were overruled: and the defendant appealed to this court. The material facts appear in the opinion.

J. E. Sinnicks, for the defendant.

S. C. Fessa, First Assistant Attorney General, for the Commonwealth.

ALLEN, J. By Pub. Sts. c. 154, § 25, in case of the absence of a justice of a police court, or at any time upon his request, a special justice may hold a session of the court, the fact being stated upon the record. The amended record in the present case shows that the court in all the different stages of the proceedings against the defendant was held by the special justice, in the absence and at the request of the justice. This was sufficient.

The defendant, however, moves to dismiss, and also in arrest of judgment, because these facts do not also appear [illegible] complaint and warrant. The complaint [illegible] is addressed to the Justice of the Police Court of C[illegible]. The [illegible] any requirement that it should be [illegible]

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was sufficient and proper, even though a special justice was sitting at the time when it was actually laid before him. The warrant properly bore test of the justice of the court, as required by St. 1888, c. 415, amending Pub. Sts. c. 154, § 30.

The motions were properly overruled. *Commonwealth* v. *Fay*, 151 Mass. 380. *Commonwealth* v. *Connor*, 155 Mass. 134.

Order denying motions affirmed.

COMMONWEALTH *vs.* CHARLES W. BINGHAM & another.

Suffolk. January 31, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Separate Trial of Joint Defendants — Discretion of Court — Evidence.

If two persons are indicted jointly, it is within the discretion of the presiding judge to grant them separate trials; and the fact that admissions have been made by one which are not evidence as against the other is not a conclusive ground for ordering them to be tried separately.

At the trial of an indictment in two counts, one charging A. with forging a deed, and the other charging A. and B. with uttering the forged deed, evidence was admitted of a conversation between a detective and B., in the absence of A., in which B. made certain admissions prejudicial to A. A. moved to strike out this evidence. The judge denied the motion; and instructed the jury at the time, but not in the final charge, that they were not to consider this evidence in dealing with the case against A. *Held*, that A. had no ground of exception.

At the trial of an indictment charging A. with forging a deed, and A. and B. with uttering the forged deed, A. called as a witness B., who testified that A. employed him to get a sum of money upon a mortgage for the benefit of the person whose signature to the deed was alleged to be forged; and that he saw A. about a week after the money was paid over to A., who at that time told him what he had done with the money. B. was then asked, "What did he say he had done with it?" This question was excluded. *Held*, that A. had no ground of exception.

INDICTMENT, in two counts. The first count charged the forging of a deed by Charles W. Bingham; and the second count charged the uttering of the forged deed by Bingham and by Joshua U[illegible]. The defendants were tried together. Trial in the Superior Court before *Braley*, J., who allowed a bill of exceptions, the substance of which follows.

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COMMONWEALTH *vs.* SAMUEL F. BROWN.

Suffolk. January 30, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Police Court — Special Justice — Record — Complaint — Warrant — Motion to Dismiss — Motion in Arrest of Judgment.

If the record in a criminal case shows that, in all the different stages of the proceedings therein, the police court to which the complaint was made was held by the special justice, in the absence and at the request of the justice, it is no ground for dismissal of the complaint and in arrest of judgment, after a verdict of guilty, that the complaint was addressed to the justice of the court, and that the warrant bore his test.

COMPLAINT to the justice of the Police Court of Chelsea, alleging that the defendant, on March 29, 1892, at Chelsea, unlawfully exposed and kept for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth. In the Superior Court, upon appeal, after a verdict of guilty, the defendant moved to dismiss the complaint, and in arrest of judgment. The motions were overruled; and the defendant appealed to this court. The material facts appear in the opinion.

J. H. Blanchard, for the defendant.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

ALLEN, J. By Pub. Sts. c. 154, § 25, in case of the absence of a justice of a police court, or at any time upon his request, a special justice may hold a session of the court, the fact being stated upon the record. The amended record in the present case shows that the court in all the different stages of the proceedings against the defendant was held by the special justice, in the absence and at the request of the justice. This was sufficient.

The defendant, however, moves to dismiss, and also in arrest of judgment, because these facts do not also appear in the complaint and warrant. The complaint was addressed "To the Justice of the Police Court of Chelsea." There is nowhere any requirement that it should be otherwise addressed, and this form

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was sufficient and proper, even though a special justice was sitting at the time when it was actually laid before him. The warrant properly bore test of the justice of the court, as required by St. 1888, c. 415, amending Pub. Sts. c. 154, § 30.

The motions were properly overruled. *Commonwealth* v. *Fay*, 151 Mass. 380. *Commonwealth* v. *Connor*, 155 Mass. 134.

Order denying motions affirmed.

COMMONWEALTH *vs.* CHARLES W. BINGHAM & another.

Suffolk. January 31, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Separate Trial of Joint Defendants — Discretion of Court — Evidence.

If two persons are indicted jointly, it is within the discretion of the presiding judge to grant them separate trials; and the fact that admissions have been made by one which are not evidence as against the other is not a conclusive ground for ordering them to be tried separately.

At the trial of an indictment in two counts, one charging A. with forging a deed, and the other charging A. and B. with uttering the forged deed, evidence was admitted of a conversation between a detective and B., in the absence of A., in which B. made certain admissions prejudicial to A. A. moved to strike out this evidence. The judge denied the motion; and instructed the jury at the time, but not in the final charge, that they were not to consider this evidence in dealing with the case against A. *Held*, that A. had no ground of exception.

At the trial of an indictment charging A. with forging a deed, and A. and B. with uttering the forged deed, A. called as a witness B., who testified that A. employed him to get a sum of money upon a mortgage for the benefit of the person whose signature to the deed was alleged to be forged; and that he saw A. about a week after the money was paid over to A., who at that time told him what he had done with the money. B. was then asked, "What did he say he had done with it?" This question was excluded. *Held*, that A. had no ground of exception.

INDICTMENT, in two counts. The first count charged the forging of a deed by Charles W. Bingham; and the second count charged the uttering of the forged deed by Bingham and by Joshua U. Briggs. The defendants were tried together. Trial in the Superior Court, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

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At the opening of the trial, the defendant Bingham moved "that the trial of these two defendants be separated, and that the defendant Bingham be permitted to go to trial alone, upon the ground that evidence will necessarily be admitted in the prosecution or defence of the defendant Briggs which, though inadmissible on the trial of Bingham alone, will, if the joint trial be allowed, unavoidably reach the ears of the jury to the fatal prejudice of the defendant Bingham, whereby his constitutional right to trial by jury will be violated."

The motion was denied, with leave to resume the same if it became apparent, during the progress of the trial, that the defendant Bingham was so prejudiced; and he excepted.

The government called as a witness John Cornish, superintendent of the Pinkerton Detective Agency, who was permitted, against the objection of the defendant Bingham, to testify to a conversation between himself and the defendant Briggs, in the absence of Bingham, in which Briggs was alleged to have stated to Cornish that Bingham came to him and engaged him (Briggs) to obtain a mortgage upon the property alleged to have been transferred to Briggs by a forged deed; that he (Briggs) obtained the loan through one Creech; that Bingham, claiming to be the duly authorized agent of John L. Barry (whose signature Bingham was charged with forging), instructed Briggs to execute and deliver a certain mortgage to one Fales for $5,000; that the deed was so executed and delivered by Briggs upon such instruction; that $5,000 was paid thereon to Bingham; and that Briggs received only twenty dollars of the money as a commission.

The defendant Bingham moved to strike out this evidence. This motion was denied; and the judge instructed the jury at the time, but not in the final charge, that they were not to consider this evidence in dealing with the case against Bingham. The defendant Bingham excepted.

The motion was then renewed on behalf of Bingham for a separate trial of the defendants, by reason of the above ruling. This motion was denied; and Bingham excepted.

Bingham called as his witness the defendant Briggs, who, after he had testified that Bingham employed him to get this money upon the mortgage for the benefit of John L. Barry, was asked by the defendant's counsel, "After this money was paid over to

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Bingham, as the agent of Barry, did you see him again?" To which the witness answered, "Yes, about a week after." He was then asked, "At that time did Bingham state to you what he had done with the money?" The witness answered, "He did." He was asked the further question, "What did he say he had done with it?" This question was excluded; and the defendant Bingham excepted.

The jury returned a verdict of not guilty as to the defendant Briggs, and a verdict of guilty as to the defendant Bingham; and Bingham alleged exceptions.

N. G. Green, for the defendants.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

HOLMES, J. The general rule is that persons jointly indicted should be tried together. Granting separate trials is a matter of discretion. The mere fact that admissions have been made by one which are not evidence as against the other is not a conclusive ground for ordering the parties to be tried separately. It may be sufficient to instruct the jury how far and against whom the evidence is to be considered. *Commonwealth* v. *James*, 99 Mass. 438, 440. *Commonwealth* v. *Bosworth*, 6 Gray, 479, 481. See *Commonwealth* v. *Miller*, 150 Mass. 69; *Commonwealth* v. *Robinson*, 1 Gray, 555.

The jury were instructed not to consider the admission of Briggs in dealing with the present defendant at the time when the evidence was put in. There was no need of repeating the instruction in the final charge, and the evidence, being pertinent against Briggs, could not be struck out.

No reason is suggested why Briggs should have been allowed to testify what Bingham said he did with the money obtained by the forgery. It does not appear what the evidence expected was, and it is difficult to imagine how any statement on the subject could have been material. *Morville* v. *American Tract Society*, 123 Mass. 129, 139. *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168.

Exceptions overruled.

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COMMONWEALTH *vs.* ALEXANDER BYRNES.

Suffolk. January 31, 1893. — February 28, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Oleomargarine in Imitation of Butter — "Expose for Sale" — Statute.

If a person has for sale in his shop oleomargarine colored in imitation of yellow butter, which is kept in a closed and covered refrigerator and cannot be seen by customers, although he has a sign in the shop to the effect that oleomargarine is sold there, he does not "expose for sale" such oleomargarine, within the meaning of the St. of 1891, c. 58, § 1.

COMPLAINT, under the St. of 1891, c. 58, § 1, to the Municipal Court of the Roxbury District of Boston, for exposing for sale oleomargarine in imitation of yellow butter. Trial in the Superior Court, before *Thompson*, J., who ruled that, upon the evidence, the jury would be authorized to convict the defendant. The jury returned a verdict of guilty; and, at the defendant's request, the case was reported for the determination of this court. If the ruling was right, the verdict was to stand; otherwise, the verdict was to be set aside. The facts material to the point decided appear in the opinion.

H. M. Ayars, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

BARKER, J. The defendant had for sale in his provision store oleomargarine colored in imitation of yellow butter. It was in a closed and covered refrigerator and could not be seen by customers, but there was in the store a sign to the effect that oleomargarine was sold there. Upon the occasion to which the complaint relates none of the substance was sold or produced to view, except that a sample was taken from the refrigerator by an agent of an official inspector. The case turns upon the meaning of the words "expose for sale" in the statute under which the complaint was drawn. St. 1891, c. 58, § 1. The purpose of the statute is to prevent deception in the manufacture and sale of imitation butter, and the statute provides that no person "shall render or manufacture, sell, offer for sale,

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expose for sale, or have in his possession with intent to sell" certain articles. The phrase to be construed is perhaps susceptible of more than one meaning. Whenever goods are placed for convenient delivery upon expected sales, they are put out and in one sense exposed for sale, whether visible to customers or not. But in our opinion the words are not so used in the statute under consideration. The prohibited articles are designed and adapted to deceive the eye, and, because their appearance is likely to induce those who see them to buy them as the genuine butter of which they are in imitation, there is special reason for prohibiting their exposure to view. The language is so full that it is not necessary to give it a strained construction in order to make the statute effective. Offering to sell and having in possession with intent to sell are likewise prohibited in the same clause and under the same penalty, so that it is easy for the pleader to select language which describes the offence with reasonable accuracy. Similar words are used in the statutes relating to milk and to intoxicating liquors, but as in such cases the charge of exposing for sale is uniformly joined with that of illegal keeping, and as such a com plaint charges but one offence and is supported by proof of either act, (*Commonwealth* v. *Nichols*, 10 Allen, 199, and *Commonwealth* v. *Dolan*, 121 Mass. 374,) it has not been necessary for this court to construe the phrase. Some of the decisions, however, intimate more or less clearly that in the statutes concerning liquors it means "expose to view." *Commonwealth* v. *McCue*, 121 Mass. 358. *Commonwealth* v. *Atkins*, 136 Mass. 160.

Under the English statute (50 & 51 Vict. c. 29, § 4) it has been held that margarine kept for sale upon the counter of a shop, but behind a screen hiding it from the view of customers, is not exposed for sale; *Crane* v. *Lawrence*, 25 Q. B. D. 152; and that parcels of margarine placed upon a counter or shelf, in view of customers, are exposed for sale, although so wrapped in paper that the margarine cannot be seen. *Wheat* v. *Brown*, [1892] 1 Q. B. 418.

Whether, if the defendant had so kept the prohibited article in closed tubs or in paper that the packages were visible as articles of merchandise on sale in his store, although the oleomargarine itself could not be seen, he would thereby have

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exposed it for sale, we do not decide. The contention that the article was not prohibited because it was in imitation of artificially colored butter, as well as of genuine butter at its best, needs no consideration.

It was immaterial that the sample was obtained without legal authority and by a trespass, if such was the case, which we have no occasion to consider. *Commonwealth* v. *Henderson*, 140 Mass. 303; *Commonwealth* v. *Tibbetts*, 157 Mass. 519.

Verdict set aside.

CAMILLE SHEPARD *vs.* BOSTON & MAINE RAILROAD.

Worcester. October 4, 1892. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Railroad — Negligence — Superintendence.

In an action against a railroad corporation, under the St. of 1887, c. 270, § 1, cl. 2, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the negligence of a person in the service of the defendant intrusted with and exercising superintendence, it appeared that the plaintiff was on a hand-car and was run into by a "wild train," that is, a train running by special orders and not regularly to be expected at the same time; that the train and the hand-car were moving towards each other round a curved ledge of rock, which prevented their seeing each other until within a distance of from ninety to fifty feet; that the train was on an up grade, going ten or twelve miles an hour, and the hand-car on a down grade, going from twelve to fifteen miles an hour; that it was a common thing for wild trains to come along, and the plaintiff, who had worked on this road as a section hand for the greater part of the last fifteen years, "knew about the habits of running the road." The defendant's rules provided that "enginemen and conductors who are to run wild trains or engines will see that the train preceding them carries a red signal for them," and that this was a notice to sectionmen that a wild train was to follow; that "if, however, for any reason, it is impossible for them to do so, they must . . . run at a slow rate of speed around all curves"; that "wild trains will, when a flag has not been sent on a previous train, before turning any curve, reduce rate to a speed not exceeding fifteen miles per hour"; that "wild trains may be run over the road on telegraphic orders without notice"; and that wild trains should whistle one mile before turning a curve. It also appeared that, in the present case, it was impossible for the wild train to get the red flag on to the train next ahead, because the latter had started. There was no direct evidence that the plaintiff knew the rules, but the section foreman in charge of the hand-car had a copy of them. The plaintiff testified that they did not know when the train was coming; and the engineer of the train

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testified that he whistled before he got to the curve, perhaps within fifteen or sixteen rods, and, on cross-examination, that there was "no notice to them that train was coming only so far as whistle was concerned." *Held*, that the jury would not have been warranted in finding the defendant negligent; and that the defendant could not be held liable on the ground that the conduct of the hand-car was governed by the section foreman, who was a person intrusted with and exercising superintendence, and to whose negligence, while superintending, the accident was due.

HOLMES, J. This is an action of tort for personal injuries, brought under the employers' liability act, St. 1887, c. 270, § 1, cl. 2, alleging that the injuries were caused by reason of the negligence of a person in the service of the defendant intrusted with and exercising superintendence. At the trial, the judge directed a verdict for the defendant, and the plaintiff excepted. The case was this. The plaintiff was on a hand-car, and was run into by a wild train, as it is called, that is, a train running by special orders and not regularly to be expected at that time. The train and the hand-car were moving towards each other round a curved ledge of rock, and the ledge prevented their seeing each other until within a short distance, say from ninety to fifty feet. The train was on an up grade, going ten or twelve miles an hour, the hand-car on a down grade, going from twelve to fifteen miles an hour, probably faster than the train. It was a common thing for wild trains to come along, and the plaintiff, who had worked on this road as a section hand for the greater part of the last fifteen years, "knew about the habits of running the road." The rules of the defendant provide that "enginemen and conductors who are to run wild trains or engines will see that the train preceding them carries a red signal for them," and that this is a notice to sectionmen that a wild train is to follow. The rule goes on, "If, however, for any reason, it is impossible for them to do so, they must . . . run at a slow rate of speed around all curves." Another rule is, "Wild trains will, when a flag has not been sent on a previous train, before turning any curve, reduce rate to a speed not exceeding fifteen miles per hour." In the present case it was impossible for the wild train to get the red flag on the train next ahead, because the latter had started. As has been said, it obeyed the rules as to speed. Another rule provided that "wild trains may be run over the road on telegraphic orders without notice."

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There was no direct evidence that the plaintiff knew the rules, but perhaps it might be presumed. The section foreman in charge of the hand-car had a copy of them. They are material only as admissions of what precautions were proper, and so far as they may have led those to whom they were communicated to expect conduct in accordance with them.

Stopping at this point, it is plain that the defendant had a right to send trains over its tracks at whatever times it saw fit, and the rules on their face gave notice that it intended to exercise its right. The rules also gave notice on their face that, while the signal ordered would be a warning when it was seen, in some cases no such warning could be given, and therefore that all persons interested must look out for themselves. The moment a man has notice that a train may come along a track without warning at any hour, if he is run down by such a train when he is travelling on the track the other way, it is impossible for him to escape the imputation of negligence merely by showing that such trains were few and the chance of their coming small. Furthermore, the plaintiff implies that they knew the train was coming by his testimony that they did not know when it was coming. On the other hand, despatching a wild train without signal is not necessarily negligence in the defendant.

The only other evidence in this case possibly bearing on the conduct of those on the hand car is the testimony of the engineer of the train, that he whistled before he got to the curve, perhaps within fifteen or sixteen rods, coupled with his statement, on cross-examination, that there was "no notice to them that train was coming only so far as whistle was concerned." It is argued that this means that he neglected to give the whistle one mile before turning the curve, required of all wild trains by a rule not mentioned above, and that the plaintiff may have been lulled into security by the omission. It would require something of a stretch of imagination and belief to suppose that the omission, if there was one, could be sufficient to justify the conduct of the people on the hand-car, or indeed that it affected their conduct at all. But it is enough to say that we do not read the testimony as having the meaning argued for. We understand it to mean that there was no warning but a whistle, not that there

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was no warning but a whistle within fifteen or sixteen rods of the curve. As we look at the plaintiff's case, the hand-car, without excuse and having notice that a wild train might come along at any time, went down grade round a curve of rock which wholly cut off the view, at a rate faster than that of the train which met it. *Clifford* v. *Old Colony Railroad*, 141 Mass. 564.

We have shown what was the real cause of the injury. Assuming that the plaintiff might have been found to have been free from personal negligence in view of his subordinate position, we have only to add that, in the opinion of a majority of the court, the jury would not have been warranted in finding the defendant negligent. As we have said, it was impossible for the wild train to communicate directly with the train next before it, because the latter had started. It is said that the wild train might have telegraphed. But there was nothing in the rules which gave any one a right to expect that, and the jury would not have been warranted in finding that the defendant owed the plaintiff any duty to do so.

A majority of the court also are of opinion that the defendant cannot be held liable on the ground that the conduct of the hand-car was governed by Doyle, the section foreman, that he was a person intrusted with and exercising superintendence, and that the accident was due to his negligence while superintending.

Exceptions overruled.

W. A. Gile, for the plaintiff.

F. P. Goulding, for the defendant.

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HOUGHTON Z. SMITH *vs.* CARRIE HALE.
SAME *vs.* SAME.

Franklin. November 30, 1892. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trespass — Exchange of Personal Property — Warranty — Breach — Rescission — Vendor and Vendee.

If an exchange of personal property has been rescinded for breach of warranty, and the warranted article has been returned to its original owner, and a restoration of the article taken by him in exchange has been demanded and refused, the person entitled to such restoration may enter upon the land of the other and take away his property, if this can be done without a breach of the peace or actual opposition.

If the vendor of a wagon warrants it to carry a certain weight, and it breaks down under a less weight, the fact that it has thus broken down does not prevent a rescission of the purchase and a return of the wagon to the vendor.

A jury may rightly find that a vendee relied upon a warranty, although he does not, at the trial, testify in express terms that he did.

At the trial of an action for trespass, it appeared that the plaintiff exchanged his wagon for the defendant's heifer, and warranted it; that the wagon broke down, and about three weeks afterwards the defendant returned it to the plaintiff's premises in that condition, and demanded the heifer, which the plaintiff refused to give up; and that the defendant, in the plaintiff's absence, entered upon his premises and took the heifer away. The defendant admitted that she must show that she offered seasonably to return the wagon to the plaintiff and demanded of him the heifer. The plaintiff asked the judge to instruct the jury that, "in order to rescind the contract the defendant was bound within a reasonable time to restore to the plaintiff the buggy [wagon] in as good condition as she received it." The judge refused to give this instruction, and instructed the jury that, if they were satisfied that the plaintiff made a warranty of the wagon, and the defendant relied upon the warranty in making the trade, and there was a breach of the warranty, "that would authorize the defendant to return the wagon to the plaintiff, and to demand of him the heifer which she traded for it in return, and it would be his duty to receive the property and give the heifer back." *Held*, that the plaintiff had no ground of exception.

A purchaser of an article may examine it for himself, and exercise his own judgment upon it, and at the same time may protect himself by taking a warranty.

TWO ACTIONS. The first was tort for breaking and entering the plaintiff's close in Conway, and the second was replevin of a heifer. The cases were tried together in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

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It appeared that, on October 10, 1890, the plaintiff exchanged a buggy wagon with side springs for a heifer of the defendant; and that both wagon and heifer were delivered.

There was evidence tending to show that the buggy had been used five or six years, and the plaintiff had owned it about six months; that the springs were each a single leaf of steel, of a pattern unfamiliar to the defendant and her husband, who was present when the exchange was negotiated; that some fear being expressed as to the sufficiency of the springs by the defendant or her husband, the plaintiff said either, "It will carry you and your wife and a hundred of meal, and I 'll warrant it," or, "It will carry you and your wife and one or two hundred of meal, and schack right along, and I 'll warrant it"; and that one or the other of these expressions was used by the plaintiff three or four times during and towards the end of the interview, which lasted an hour or more, at the time of the exchange.

There was also evidence tending to show that the only statement made by the plaintiff in which the word warrant was used was in this form, "I 'll warrant it to carry you and your wife and a hundred of meal," and that it was made only once. The defendant contended that the plaintiff's statement, in whichever of the above forms it was made, constituted an express and special warranty of the buggy, which the plaintiff denied, and contended that there was no warranty of any kind. The defendant did not state in her testimony whether or not she relied on the alleged warranty in making the contract of exchange, and made no statement with reference to such reliance. It appeared that the exchange was negotiated on premises occupied by the defendant and her husband; that the buggy was before them during the whole negotiation; that the defendant's husband, at her request, rode in the buggy with the plaintiff for half a mile or a mile to try it; that also during the negotiation the defendant's husband, in her presence, got down on the ground under the buggy, and examined the iron and wood work, and on getting up said, in his wife's presence, "I tell you, they made buggies when that was built," and also in his wife's presence spoke of the manner in which the body of the buggy was fastened to the springs as a good point about the buggy; that the defendant's husband had previously examined the buggy;

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and that, after the remarks by him above referred to, when asked by his wife during the negotiation what she had better do, he replied, "Well, if you want a buggy, I don't know as you can do better than trade, but you are to use your own judgment."

It also appeared that, three days after the exchange, the defendant broke one of the springs of the buggy while in use; that the same day, after consultation with counsel, she had a conversation with the plaintiff, in which she asked him if he did not warrant the buggy, and what he was going to do about the broken spring; and that the plaintiff and the defendant then agreed that certain repairs of the buggy should be made by the plaintiff, either a new spring furnished, or a new spring furnished and put in place. The evidence as to the terms of this agreement was contradictory. There was also evidence tending to show that, two or three weeks later, the defendant asked the plaintiff why he did not carry out his agreement to repair the buggy; that he claimed to have done so; that, several days after this last conversation, the defendant, claiming a right to rescind the contract for breach of warranty, took the buggy, with one spring broken, to the plaintiff's premises, left it there against his orders, and demanded the heifer; that the plaintiff refused to give up the heifer, and forbade the defendant to take it; and that on the following day the defendant, in the absence of the plaintiff, entered upon his premises and took the heifer out of his barn, doing no damage except what is to be inferred from such entry against the plaintiff's will.

It also appeared that, on the day the spring broke, the plaintiff, after he knew of the break, told one Alden that he warranted the buggy to carry the defendant, her husband, and a hundred of meal.

Upon all the evidence, the defendant contended that she relied upon the alleged warranty as an inducement to the formation of the contract of exchange; and the plaintiff contended that no such reliance was proved, and that it appeared that the defendant formed the contract, relying upon her own judgment after inspection and examination of the buggy by her husband and herself.

The plaintiff requested the judge to instruct the jury as follows: "1. If there was in the case no oral testimony from the

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defendant of any reliance by her upon the alleged warranty, they should find for the plaintiff. 2. In order to rescind the contract, the defendant was bound, within a reasonable time, to restore to the plaintiff the buggy in as good condition as she received it. 3. Where a purchaser inquires for himself and acts upon his own opinion, he cannot say that he has been misled by a false statement of another; and if he inspects and examines the article for himself, and selects it after exercising his own judgment upon its character and quality, the vendor only warrants that the article, so far as he knows, is what it appeared to be, and what he believed it to be at the time he sold it."

The judge declined to give the instructions requested, but instructed the jury, in substance, as follows: "A warranty may be made without any set form of words. It is not necessary to use the words 'I warrant,' but when a person who has an article for sale makes a representation of fact in regard to the article as true, and the party who is buying the article relies upon that representation as an inducement for the purchase or sale, that would be a warranty for which the plaintiff would be liable in case of any breach. Now if you are satisfied from the evidence that the plaintiff made a certain warranty of that wagon, and that the defendant relied upon that warranty in making the purchase of the wagon or trade, and that there was a breach of that warranty, that would authorize the defendant to return the wagon to the plaintiff, and to demand of him the heifer which she traded for it in return, and it would be his duty to receive the property and give the heifer back. The defendant claims that there is a warranty of a certain kind. The burden is upon her to show that there is a warranty. Whatever proposition is set up by her, she must maintain by a fair preponderance of the evidence."

The defendant admitted that she must show that she offered seasonably to return the buggy to the plaintiff, and demanded of him the heifer, and both counsel argued to the jury as to whether such seasonable return was shown. It also appeared in evidence that the buggy was not used by the defendant after the spring was broken, and there was no evidence, nor any claim made, that the wagon was not in as good condition when returned as when taken by the defendant, except the condition of the spring,

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or that the defendant then objected to the return as too late. No instruction was asked as to the time at which the buggy was to be returned, except as above stated, and none was given, but the case was argued to the jury on the ground that the defendant, in order to entitle her to the right to rescind the contract, must show that she had done it within a reasonable time, regard being had to all the circumstances of the case.

At the conclusion of the charge, the plaintiff called the judge's attention to his omission to give the third instruction requested, in view of his contention that the defendant made the exchange relying on her own judgment; but the judge declined further to instruct the jury upon that point.

The plaintiff further requested the judge to instruct the jury, "that if the defendant had a right to rescind her contract, and resume the ownership of the heifer, she had no right to enter the plaintiff's close to retake the heifer, and was liable in this action if she so did."

The judge refused to give this instruction, but instructed the jury as follows: "Now if it is true that, at the time when she took this heifer away, he was the owner of it, and she had no right to the possession of it, if you find that to be the fact, he is entitled to maintain his action, and the verdict should be for the plaintiff; and if, on the other hand, you should find upon all the evidence that the heifer did not belong to him, but belonged to the defendant, she would have the right to come upon his premises, committing no breach of the peace and breaking no doors or bars, or anything else, and if she had a right to the possession of the heifer, she would have a right to do what she did in taking it away. . . . But if you find that there was a breach of the warranty, and that she relied upon the warranty in purchasing the wagon, and if you find that that breach of the warranty never was settled, then she would have a right to return the wagon and demand her heifer back. And if he refused to give it up to her, she would have a right to enter upon his premises, if she could do it peaceably in the manner described by her, and take the heifer away, and he would have no right of action against her."

The jury returned a verdict for the defendant in each case; and the plaintiff alleged exceptions.

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F. L. Greene, for the plaintiff.

S. T. Field, for the defendant.

ALLEN, J. It is settled in this Commonwealth that a breach of warranty upon a sale of personal property authorizes the purchaser to rescind the contract and return the article, although there was no express agreement to that effect, and no fraud. *Bryant* v. *Isburgh*, 13 Gray, 607. It has been found in this case that there was such breach of warranty and right of rescission. The bill of exceptions states that there was evidence tending to show that the defendant, claiming a right to rescind, left the buggy upon the plaintiff's premises, and demanded the heifer, and that the plaintiff refused to give up the heifer and forbade the defendant to take it. Though it is not expressly stated in the bill of exceptions that these facts appeared to be true, yet the plaintiff's brief relies on the plaintiff's prohibition as proved, and assumes the truth of the above facts, and therefore we assume them to have been proved.

The most important question in the case is, whether on these facts the defendant had a right to enter upon the plaintiff's premises and reclaim her heifer. We are of opinion that she had. It is true that it has been held that, where nothing appears except that the goods of one person are upon the land of another, the owner of the goods has no implied license from the owner of the land to enter and take them away. *Anthony* v. *Haneys*, 8 Bing. 186. 2 Greenl. Ev. § 627. And this rule has been applied to the case of a mortgage of personal property before foreclosure, if the goods have been left in the mortgagor's possession. *McLeod* v. *Jones*, 105 Mass. 403. But after foreclosure the mortgagee has an implied irrevocable license to enter and carry away his goods. *McNeal* v. *Emerson*, 15 Gray, 384. Where a piano was hired for an indefinite time, with no agreement giving to the owner a right to enter the hirer's premises and reclaim the piano without prior demand or notice, it was held that he had no implied license to do so. *Smith* v. *Pierce*, 110 Mass. 35. But where one sells personal property which is on his own land, the purchaser has an implied license to enter, and take it away. *Nettleton* v. *Sikes*, 8 Met. 34. *Giles* v. *Simonds*, 15 Gray, 441.

In the present case, on the facts assumed, the defendant had a right to the possession of her heifer under her bargain with

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the plaintiff, and it was the plaintiff's duty to restore it, and the defendant had demanded it, and the plaintiff had refused to deliver it, and in this state of things under the agreement between them the law gave to the defendant a right to enter and take away the heifer in the way in which she did it. *Drake* v. *Wells*, 11 Allen, 141. *Heath* v. *Randall*, 4 Cush. 195. Cooley on Torts, 50 *et seq.*

The plaintiff further contends that the defendant's right of rescission was lost because the buggy was broken, and therefore was not returned to him in the same condition in which it was when the defendant took it. But the breaking of the spring was just what the plaintiff had warranted against. It occurred without the defendant's fault. Under these circumstances, the plaintiff cannot complain of the accident to the buggy. *Head* v. *Tattersall*, L. R. 7 Ex. 7. *Elphick* v. *Barnes*, 5 C. P. D. 321.

The first instruction requested was rightly refused. The jury might well find from the evidence that the defendant relied on the warranty, though in her testimony she did not say in express terms that she did so.

The plaintiff's second request for instructions was that "in order to rescind the contract the defendant was bound within a reasonable time to restore to the plaintiff the buggy in as good condition as she received it." He now raises the objection that the judge did not say to the jury that the return of the buggy must be within a reasonable time. But there was no controversy at the trial on this point. The defendant expressly conceded the doctrine as to reasonable time. The stress of the request turned upon the last portion of it, as to the condition of the buggy. It is true, that theoretical accuracy would have required a statement that the return must be within a reasonable time, if indeed that question was to be submitted to the jury at all. But the jury could not have been misled by the omission, and there is no occasion to grant a new trial on this ground.

The plaintiff's third request does not contain a correct statement of the law, applicable to the case. In the first place, there was no question of fraud, and no instructions on that hypothesis were called for; and as to the remainder of the request, it is enough to say that a purchaser of an article may examine it for

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himself, and exercise his own judgment upon it, and at the same time may protect himself by taking a warranty. The refusal to give the instructions requested was entirely right. *Harrington* v. *Smith*, 138 Mass. 92, 98.

Exceptions overruled in both cases.

JAMES E. WELLINGTON & others *vs.* BOSTON & MAINE RAILROAD.

Middlesex. November 29, 1892. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Land Damages — Railroad — Sheriff's Jury — Evidence — Verdict.

If a sufficient number of the jurors summoned to try a petition for an assessment of damages for the taking of land for a railroad are not present, it is no objection to talesmen returned by the sheriff under the provisions of the Pub. Sts. c. 49, § 41, that they are not residents of the nearest towns to that in which the land lies, if they are qualified and liable to serve in that county.

At the trial of a petition before a sheriff's jury, for an assessment of damages occasioned to the petitioner by the taking of his land by a railroad corporation, evidence of a declaration of the general manager of the corporation as to the purpose to which the land was to be put is incompetent; and the award by the county commissioners of damages for the taking is also properly excluded.

At the trial of a joint petition by three persons before a sheriff's jury, for an assessment of damages sustained by each petitioner by the taking of his land for railroad purposes, the petitioners contended that each could recover the value of his own land taken and the damages occasioned to his other lands in the same village by the whole taking; and they were allowed to introduce evidence upon this theory. The respondent asked instructions based upon a contrary theory, which were refused. *Held*, that the verdicts must be set aside.

PETITION to the county commissioners for a sheriff's jury, to assess the damages sustained by the taking by the respondent of the petitioners' land in that part of Medford called Wellington for its railroad. The jury awarded each petitioner a certain sum, and their verdicts were accepted by the Superior Court; and the respondent appealed to this court. The facts appear in the opinion.

S. Butler, for the respondent.

J. D. Long, (*B. E. Perry* with him,) for the petitioners.

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BARKER, J. 1. As there must be a new trial upon other grounds, we need not decide whether the respondent can take advantage of the irregularities in procuring the jury. The statute (Pub. Sts. c. 49, § 39) has been construed to exclude jurors living in the town where the lands lie, and to authorize requisitions upon any three towns of the county which adjoin that town, without reference to the question of proximity to the lands. *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316, 324. *Brown* v. *Boston & Worcester Railroad*, 13 Met. 327, *n.* *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291, 295. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115. *Reed* v. *Hanover Branch Railroad*, 105 Mass. 303. Requisitions were properly made upon three towns. But in consequence of an objection in advance of the hearing, the sheriff irregularly omitted to notify two of the men drawn, and made a requisition for jurors from a fourth town. When objection was made to the list so constituted, instead of dismissing the jurors from the fourth town, he excused those from a town upon which one of the original requisitions was made. In so doing he chose arbitrarily between jurors present, and the expense, which in these cases is borne by the parties, was increased. There was no error in returning the talesmen. The statute (Pub. Sts. c. 49, § 41) which prescribes the course to be pursued when enough jurors are not present directs merely the return of "suitable persons to supply the deficiency," and does not require them to be residents of the nearest towns. It is only necessary that they shall be qualified and liable to serve in that county. If the sheriff had required the challenges to be made before the choice of the foreman, all the jurors who served would have been able to participate in the choice.

2. Evidence of the declaration of the general manager of the respondent as to the purpose to which the land was to be put was incompetent. He was not an agent of the corporation for the purpose of making admissions. *Boston & Maine Railroad* v. *Ordway*, 140 Mass. 510. *Williamson* v. *Cambridge Railroad*, 144 Mass. 148. *Leistritz* v. *American Zylonite Co.* 154 Mass. 382. *Richstain* v. *Washington Mills*, 157 Mass. 538. The evidence, however, was of little importance, as the statement was merely that the land was to be used for a purpose for which

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the respondent could lawfully use it, and the jury could properly consider the possibility of such a use.

3. The award of the commissioners was properly excluded. It was offered only as showing their estimate of the damages, and not because it contained an order affecting the damages, as was the case in *White* v. *Boston & Providence Railroad*, 6 Cush. 420, and in *Chapin* v. *Boston & Providence Railroad*, 6 Cush. 422. To admit such an award for the purpose for which it was offered in the present case would be to introduce the opinion of the commissioners, without affording the petitioners an opportunity for cross-examination, or enabling the jury to weigh the opinion in connection with the appearance of the commissioners and their means of knowledge. Being merely the decision from which in effect the petitioners had appealed, it was immaterial.

4. The verdicts must be set aside, because the jury were permitted to award damages upon an erroneous view of the law. There are three separate verdicts. The claimants join in the petition, but their rights are distinct. They represent themselves as severally dissatisfied with the estimate made by the commissioners of their several damages by the taking of their respective lands, and each asks for the damage done by the taking of his own land, and not for damage to his land by the taking of the land of the others. The petitioners own much of the village of Wellington and some outlying lands. When the railroad was built, about 1845, the locality was a farm of some one hundred and fifty acres, owned in common by two brothers, James and Isaac Wellington. The railroad skirted the line of demarcation between a swamp on the east and the upland which is now the village. The Medford branch was built about 1852, leaving the main line at the village. The Wellingtons settled for their damages when the main line and the branch were built. About 1853 they divided the farm into four parts, each taking two in severalty, and the tracts were then cut up into house lots, which were put upon the market. Many of them have been sold and built upon, and others have been sold, but remain vacant. The streets dividing the land have been wrought, and are in use, many of them having concrete walks and shade trees. Middlesex Avenue, a county way, runs through the village nearly parallel with the main line of railroad, and at a distance varying

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from about twelve hundred to four hundred feet. The lands now taken are on the village side of the main line, and are a strip of marsh one hundred feet wide, belonging to James E. Wellington, a strip one hundred feet wide at its south end and thirty feet wide at its north end, belonging in common to James E. Wellington, Angelina W. Crosby, and Adrianna W. Kidder, and another strip 12¾ feet wide, separated from the second by the station grounds, and owned by James E. Wellington, as trustee under the will of Isaac Wellington. This strip is entirely within Craddock Avenue, one of the streets dividing the land into house lots, and is on the opposite side of the street from the lots. The narrow part of the second parcel is also within the same street, and on the opposite side from the lots. The rest of the second parcel was taken from the rear of lots which lay between the railroad and another avenue, and which were of unequal depth, but the smallest of which, after the taking, was at least one hundred and fifty feet deep. The first parcel was swamp land outside the village. The original partition left the site of the village in four rectangular parcels, two of which, given in severalty to Isaac Wellington, touched each other near the centre of the whole tract, and the two given to James E. Wellington were entirely separate.

The petitioners contended, at the trial, that each could recover the value of his own land taken, and the damages caused to all of his other lands in Wellington by the whole taking, that is, by devoting to railroad purposes the whole strip taken from all three petitioners; and they were allowed to introduce evidence upon this theory. The respondent asked instructions based upon a contrary theory, which were refused. One of the petitioners was allowed to testify as to the value of a parcel of land not divided into lots, a quarter of a mile distant, and on the farther side of the village from the railroad, and to give his opinion as to the effect of the taking of April 29, 1890, that is, of the whole taking, upon that parcel. A plan of the village and adjacent lands, called the Binney plan, was used at the trial. An expert was allowed, without restriction, to give his opinion of the effect of the taking upon other lands of the petitioners, as shown on the Binney plan, and other witnesses were allowed to testify to the effect of the taking upon all of the petitioners' land not taken.

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We see nothing in the case to indicate that any special or peculiar damage was caused to any of the remaining lands of the petitioners, save the lots immediately adjoining the land taken, or upon the same street with the railroad. If the widening of the railroad and the laying of additional tracks, whether for traffic or to be used as a freight yard, made the village less desirable as a place of residence, because it was more difficult or dangerous to cross the tracks in passing from one locality to another, or because of increased noise or smoke, or because the tracks, or the cars which might be stored upon them, might be unsightly and displeasing, none of these circumstances would properly be elements of the damages to be awarded to lots no portion of which was taken, because they were general, affecting the whole village, and not special and peculiar to the lands of the petitioners. *Eames* v. *New England Worsted Co.* 11 Met. 570. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385, 391. *Boston & Worcester Railroad* v. *Old Colony Railroad*, 12 Cush. 605. *Fuller* v. *Chicopee Manuf. Co.* 16 Gray, 46. *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313. Such considerations are to affect the damages to the residue of those lots parts of which are taken only so far as the railroad is brought nearer, and the inconvenience thus aggravated by its greater proximity due to the fact that part of the lots are taken. *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10. *Johnson* v. *Boston*, 130 Mass. 452, 454. *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174, 178. See also *Pierce* v. *Worcester & Nashua Railroad*, 105 Mass. 199, 201; *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27; *Drury* v. *Midland Railroad*, 127 Mass. 571, 583; *Sawyer* v. *Davis*, 136 Mass. 239, 241. Craddock Avenue seems not to be a public way, and therefore the narrowing caused by the taking of some portion of it for the railroad may be a ground for allowing damages to lots abutting on the street, and perhaps to other lots which had an easement on the avenue. See *Stanwood* v. *Malden*, 157 Mass. 17. But this certainly would not be a ground of damage to all the lands in Wellington. *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291, 298. *Brainard* v. *Connecticut River Railroad*, 7 Cush. 506, 511. *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1.

Verdicts set aside.

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GEORGE W. ELA *vs.* ALBIN YEAW & others.

Essex. January 10, 1892. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Levy — Sale of Land on Execution — Officer's Return — Misdescription of Boundary Line — Adjournment of Sale.

A parcel of land was bounded on the east by a railroad, on the west by an embankment thirty feet wide, and on the north, when conveyed to A., ninety-three feet on E. Street. By subsequent arrangements between A. and the owner of the embankment, the position of the embankment at its northerly end by E. Street was moved about seventy-eight feet to the west, and a triangular lot bounded about seventy-eight feet on the north was conveyed to A. Subsequently the land was levied upon and sold on an execution against A. The officer's return on the execution described the land as bounded "northerly about ninety feet on E. Street," referred to A.'s original deed, and stated that his description was subject to any changes which had been made by agreement in the boundary lines of the embankment. *Held*, on a writ of entry by A. to recover the land, that the misdescription of the length of the boundary line on E. Street did not avoid the levy, although the levy was by sale and not by extent.

The statement in an officer's return of a levy and sale of land on execution, that he adjourned the sale "deeming it for the interest of all parties concerned," is sufficient, without saying also that he deemed it "expedient."

WRIT OF ENTRY, dated May 8, 1882, to recover a parcel of land in Lawrence. Plea, *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the tenants, to this court, on appeal, upon agreed facts, in substance as follows.

On September 5, 1877, and for nearly twenty years prior thereto, the demandant was in possession of the land and seised thereof in fee. The tenants claim under the demandant by a levy and sale on an execution, which issued in favor of the Adams National Bank against the demandant on July 2, 1877, and was returned on October 8, 1877. The demanded premises are shown on the plan herewith printed, being included within the dotted lines therein.

The officer's return on the execution described the land as follows: "Lying west of and adjoining the Boston and Maine Railroad, and is bounded easterly about seven hundred and twenty feet by the westerly line of said railroad, extending from

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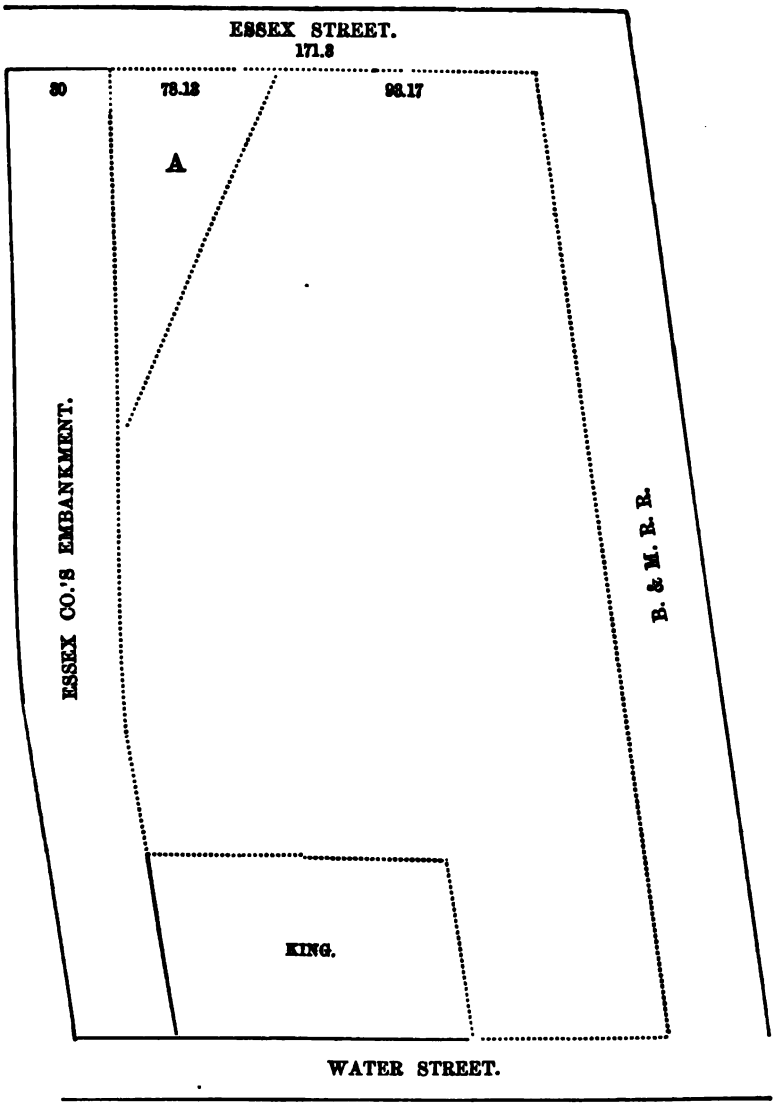

Essex Street to Water Street; northerly about ninety feet on Essex Street; westerly about six hundred and fifty-three feet by an embankment, thirty feet wide, to land deeded by the said Ela to H. B. King; southerly by land deeded to said King, about two hundred and fifty-three feet; westerly by land deeded to said King, ninety-three feet, to said Water

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Street; southerly by the northerly line of said Water Street, about one hundred and twenty-seven feet."

The return also contained the following recital: "Meaning hereby to describe all of the three lots of land bought by the said George W. Ela of the Essex Company by deed dated July 1, 1858, except such part thereof as has been sold by said Ela, and subject to all reservations made by the said Essex Company and to any changes which have been made by an agreement between the said Ela and the Essex Company in boundary lines of abutting streets and in the boundary lines of the embankment reserved by the Essex Company."

The return further stated that, on the day named in the notices and advertisements of the proposed sale, he appeared to sell the property, but, "deeming it for the interest of all parties concerned," he adjourned the sale to a subsequent day.

The notice to the demandant and the public notices referred to in the return contained the same description of the land as that given in the return. The officer executed a sheriff's deed on the same day of the sale to one Thayer, who was the attorney of the judgment creditor, from whom the tenants derive their title. The deed was in the ordinary form of a sheriff's deed, containing the usual covenants, and was duly recorded. At the date of this writ, the tenants were in exclusive possession of the demanded premises, claiming title in fee under the sale.

The land in question was conveyed by a deed from the Essex Company to the demandant dated July 1, 1858, and referred to in the return on the execution, and was one of three lots of land, as therein recited. By subsequent arrangements between the demandant and the Essex Company, the position of the embankment at its northerly end by Essex Street was moved about seventy-eight feet to the west, and a triangular lot bounded about seventy-eight feet on the north, and marked A on the plan, was conveyed to the demandant.

E. T. Burley, for the demandant.

C. U. Bell & W. S. Knox, (*W. E. Rowell* with them,) for the tenants.

ALLEN, J. 1. The levy was not rendered invalid by the misdescription of the length of the boundary line on Essex Street. The monuments referred to were plain. On the east the land

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was bounded by the westerly line of the railroad; northerly about ninety feet on Essex Street; westerly by an embankment thirty feet wide. There was but one embankment visible, its distance from the westerly line of the railroad being about one hundred and seventy-one feet. To any one examining the premises, the eastern and western boundaries were obvious. By the original deed to the demandant, his lot was only ninety-three $\frac{17}{100}$ feet on Essex Street. By subsequent arrangements with the Essex Company, the position of the embankment at its northerly end by Essex Street had been moved about seventy-eight feet to the west, and a triangular lot bounded about seventy-eight feet on the north had been conveyed to the demandant. The return of the officer refers to the demandant's original deed, and adds that his description is subject to any changes made by agreement in the boundary line of the embankment. The misdescription of the length of the northerly line is partly corrected by this reference, and, the existing monuments on both sides being plain, the misdescription does not avoid the levy, although the levy was by sale, and not by extent. There was no fraudulent intent to mislead. *Baker* v. *Baker*, 125 Mass. 7. *Buffum* v. *Deane*, 8 Cush. 35. *Chappell* v. *Hunt*, 8 Gray, 427. *Noble* v. *Googins*, 99 Mass. 231. *George* v. *Wood*, 7 Allen, 14.

2. The statement in the officer's return that he adjourned the sale "deeming it for the interest of all parties concerned," is sufficient, without saying also that he deemed it "expedient." *Sanborn* v. *Chamberlin*, 101 Mass. 409, 417.

Judgment affirmed.

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CHARLES A. HOBBS *vs.* MASSASOIT WHIP COMPANY.

Essex. January 12, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Retention of Merchandise — Acceptance.

A. brought an action against B. for the price of eelskins. A. had sent eelskins in the same way four or five times before, which skins had been accepted and paid for by B. On B.'s testimony, it was to be assumed that if he had admitted the eelskins to be over a certain length, and fit for his business, as A. testified, and the jury found that they were, he would have accepted them; that this was understood by A.; and that there was a standing offer to A. for such skins. *Held*, that A. was warranted in sending B. skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did not impose on B. a duty to act about them; and silence on his part, coupled with a retention of the skins for a reasonable time, might be found by the jury to warrant A. in assuming that they were accepted, and thus to amount to an acceptance.

CONTRACT, upon an account annexed for one hundred and eight $\frac{50}{100}$ dollars, for 2,350 eelskins sold by the plaintiff to the defendant. At the trial in the Superior Court, before *Hammond*, J., it appeared in evidence that the plaintiff lived in Saugus, and the defendant had its usual place of business in Westfield, and was engaged in the manufacture of whips.

The plaintiff testified that he delivered the skins in question to one Harding of Lynn, on February 18, 1890, who upon the same or the following day forwarded them to the defendant; that the skins were in good condition when received by Harding, 2,050 of them being over twenty-seven inches in length each, and the balance over twenty-two inches in length each; that he had forwarded eelskins to the defendant through said Harding several different times in 1888 and 1889, and received payment therefor from the defendant; that he knew the defendant used such skins in its business in the manufacture of whips; that the skins sent on February 18, 1890, were for such use; that he understood that all skins sent by him were to be in good condition and over twenty-two inches in length, and that the defendant had never ordered of him skins less than twenty-two inches in length; and that Harding took charge of the skins for him and

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that he received orders through Harding, but that Harding was not his agent.

Harding, who was called as a witness, testified that he had some correspondence for the plaintiff with the defendant in reference to skins; that he acted for the plaintiff in forwarding skins to the defendant, and in receiving pay therefor, and acted for the plaintiff in giving him any information, order, or notice which he received from the defendant in reference to skins sent or to be sent.

The defendant contended that Harding acted as the plaintiff's agent. The plaintiff contended that Harding acted as the agent of the defendant, and not as his agent. On this point the evidence was conflicting, and the question was submitted to the jury, upon instructions not excepted to.

Four letters were offered in evidence, three of which, dated in 1889, showed transactions between the plaintiff and the defendant, and the fourth of which, dated Lynn, February 18, 1890, signed by Harding and addressed to the defendant, was as follows: "We send you to-day, for Mr. Hobbs, 2,050 eelskins at .05 and 300 at .02."

One Pirnie, president of the defendant corporation, called by the defendant, testified that before February 18, 1890, the plaintiff had sent eelskins four or five times by Harding to the defendant, which were received and paid for by the defendant; that the defendant agreed to pay five cents each for eelskins over twenty-seven inches in length, and two cents each for eelskins over twenty-two inches in length and less than twenty-seven inches, suitable for use in the defendant's business; that Harding was not acting for the defendant, but for the plaintiff; that the defendant never ordered the skins in question, and did not purchase them in any manner, and that no officer or employee of the corporation except himself had authority to order or purchase skins, and that he never ordered or purchased those in question; that skins came from Hobbs through Harding on February 19 or 20, 1890, and were at once examined by him, and found to be less than twenty-two inches in length, and found to be unfit for use, and that he notified Harding at once, in writing, that the skins were unfit for use, and that they were held subject to the plaintiff's order; that the skins remained some months at the defendant's place of

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business in Westfield, and were then destroyed; and that the defendant received no other skins in the month of February from the plaintiff or from any other person.

One Case, the defendant's shipping clerk, and one Gowdy, the defendant's treasurer, testified that the skins sent on February 18, 1890, and received February 19 or 20, 1890, were examined by them, and were very short, in very bad shape, not fit for use, and worthless.

The judge instructed the jury that the plaintiff could not recover for eelskins less than twenty-two inches in length, nor for any of the eelskins if they were in the condition described by the witnesses for the defendant.

The plaintiff denied that he received any notice from the defendant that the skins were not suitable for use, or that they were held subject to his order.

The judge, among other instructions, also gave the following: "Whether there was any prior contract or not, if skins are sent to them (the defendants) and they see fit, whether they have agreed to take them or not, to lie back and say nothing, having reason to suppose that the man who has sent them believes that they are taking them, since they say nothing about it, then, if they fail to notify, you would be warranted in finding for the plaintiff, on that state of things."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. L. Evans, for the defendant.

J. E. Hanly & J. F. Libby, for the plaintiff.

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

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Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See *Bushel* v. *Wheeler*, 15 Q. B. 442; Benjamin on Sales, §§ 162–164; *Taylor* v. *Dexter Engine Co.* 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party, — a principle sometimes lost sight of in the cases. *O'Donnell* v. *Clinton*, 145 Mass. 461, 463. *McCarthy* v. *Boston & Lowell Railroad*, 148 Mass. 550, 552.

Exceptions overruled.

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MICHAEL O'BRIEN *vs.* CORNELIUS FLYNN.

Norfolk. January 19, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trespass to Land — Passageway — Action.

At the time when a certain tract of land was divided into building lots, and a plan thereof was made and recorded, a strip of land was left open, as if for a passage, though it was not called so on the plan; and when the owner of the tract afterwards conveyed two of the lots adjoining the strip to A., no mention was made of the strip, but the land conveyed was described as "lots number five and six on a plan." B. also acquired a lot of the land adjoining the strip. *Held*, that A. could not maintain an action against B. for trespass, in using the strip for a passage, there being no obstruction to A.'s use of it as a passage.

TORT, for breaking and entering the plaintiff's close in Braintree. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, the material parts of which appear in the opinion.

J. W. McAnarney, for the plaintiff.

W. G. A. Pattee, for the defendant.

ALLEN, J. In trespass, the plaintiff must recover on the strength of his own title or possession, and we are at a loss to see how the plaintiff has ever gained any exclusive right to the use of the strip of land adjoining his lot. At the time when the whole of the Bartlett land was divided into building lots, and a plan thereof was made and recorded, a strip of land was left open adjoining the lots now owned by the plaintiff and the defendant, as if for a passage, though it was not called so on the plan; and when the owners conveyed the two lots which the plaintiff now owns, adjoining said strip, no mention whatever was made of the strip of land, but the land conveyed was merely described as "lots number five and six on a plan," etc. Now if this gave a right to use the strip of land for a passage, it certainly gave no exclusive right so to use it; and the plaintiff has no right to complain of the defendant's use of the strip of land for a passage, there being no obstruction to the plaintiff's use of it as a passage. Since the plaintiff

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has no exclusive right in the strip of land, we do not have to consider the extent of the defendant's right as against the owner of the fee. *Judgment affirmed.*

COMMONWEALTH *vs.* JOHN F. IGO.

Middlesex. January 30, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Intent — Complaint — Duplicity.

A complaint on the Pub. Sts. c. 100, § 17, charging the bringing by the defendant into a town in which licenses of the first five classes were not granted certain intoxicating liquors with intent "to sell the same himself, to have the same sold by another, and having reasonable cause to believe that the same is intended to be sold in violation of law," is not bad for duplicity.

LATHROP, J. The complaint in this case charges the bringing by the defendant into a town in which licenses of the first five classes were not granted certain intoxicating liquors with intent "to sell the same himself, to have the same sold by another, and having reasonable cause to believe that the same is intended to be sold in violation of law." The complaint contains the other necessary averments, and the only question is whether it is bad for duplicity.

The Pub. Sts. c. 100, § 17, make it an offence for a person to bring intoxicating liquors into a town in which licenses of the first five classes are not granted, "with intent to sell the same himself, or to have the same sold by another, or having reasonable cause to believe that the same is intended to be sold in violation of law."

Under this statute, it has been held that it is not sufficient simply to charge that the liquors were brought into the town in violation of the statute. *Commonwealth* v. *Intoxicating Liquors*, 138 Mass. 506. This was on the ground that the complaint alleged no illegal intent. It was also said that the statute created several offences. While this is in a certain sense true, yet it is also true that the gist of the offence is the bringing into the town intoxicating liquors with one or more of the

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illegal intents specified in the statute. The offence may be properly charged in one count, although more than one intent is alleged. *Commonwealth* v. *Moody*, 143 Mass. 177. *Commonwealth* v. *Ferry*, 146 Mass. 203, 208. *Commonwealth* v. *Clancy*, 154 Mass. 128, 132.

Exceptions overruled.

M. J. Kelley, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* HENRY C. BROTHERS.

Middlesex. January 30, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Illegal Keeping for Sale — Motion for Continuance — Druggist's License — Screen Law — Complaint — Evidence — Statute.

Where there are two shires of a county, in each of which the Superior Court sits alternately, no exception lies to the refusal of the presiding judge to postpone the trial of a criminal case in one of the places to the sitting in the other place three months later, or to adjourn to the latter place for the trial of the case.

The provisions of the Pub. Sts. c. 100, § 12, forbidding any person licensed to sell intoxicating liquors and to place or maintain screens or other obstructions in such a way as to interfere with a view of the business conducted upon the premises, apply to licensees of the sixth class, as well as to all other licensees.

A complaint against a licensee of the sixth class, for the unlawful keeping for sale of intoxicating liquors, need not aver that the provisions of the Pub. Sts. c. 100, § 12, forbidding any licensee to place or maintain screens or other obstructions in such a way as to interfere with a view of the business conducted upon the premises, have been violated.

It is not necessary to aver in a complaint against a licensee, for the unlawful keeping for sale of intoxicating liquors, or to prove at the trial, that the licensing board had required the defendant to remove the blinds and curtains upon the licensed premises.

At the trial of a complaint against a licensee, for the unlawful keeping for sale of intoxicating liquors, the fact that the windows of the licensed premises open upon private grounds does not render it incompetent to prove that the view through the windows, or one of them, was obstructed.

At the trial of a complaint against a licensee of the sixth class, for the unlawful keeping for sale of intoxicating liquors, there was evidence that two police officers visited the defendant's drug store in the evening of the day named in the complaint, and found in a back room connecting with the store, called the "back shop," two men sitting, with the gas turned down; that, after turning on the gas, they also found several prescription glasses standing upon a shelf over a

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sink, and smelling of liquor; that on the shelf near the glasses was a demijohn containing whiskey, and the shelf there was wet with whiskey and showed marks where glasses had been placed; that the officers also found in the cellar a keg containing cider, and on a box near the keg was a glass wet with cider, and the box was also wet with cider where the glass stood; that they also found bottles of ale, recently opened, with some ale in each bottle, and also other liquors in bottles and barrels in the cellar; that there were two windows in the back shop, upon one of which were blinds closed and a curtain pulled wholly down, and the other of which had no curtain, but the view to which was obstructed to some extent by a pile of boxes and barrels in the yard; that the officers called the defendant's attention to the condition of the prescription glasses, the shelf, and the demijohn in the back shop, and he made no reply; and that at other times near the date of the complaint persons were seen going into and coming out from the back shop under circumstances which might be deemed suspicious. *Held*, that the evidence was competent, and was sufficient to warrant a conviction.

At the trial of a complaint against a licensee of the sixth class, for the unlawful keeping for sale of intoxicating liquors, it is not necessary to prove that cider found upon the defendant's premises on the day named in the complaint contained more than one per cent of alcohol.

If a druggist having a license of the sixth class, sells intoxicating liquors in violation thereof, it is not unconstitutional to impose upon him a penalty, in addition to providing by statute that his license shall be void.

COMPLAINT, to the Police Court of Lowell, for unlawfully exposing and keeping for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth, on March 13, 1892, at Lowell. Trial in the Superior Court, before *Fessenden*, J., who allowed a bill of exceptions, in substance as follows.

The case came on for trial at the June sitting, 1892, at East Cambridge. Before the jury were impanelled, the defendant moved that the case be postponed to the October sitting, 1892, at Lowell, which motion was denied; and thereupon the defendant moved that the court then adjourn to Lowell for the trial of the case, which motion was also denied; and the defendant excepted.

The defendant had a license of the sixth class as a druggist to sell intoxicating liquors, not to be drunk on the premises, for medicinal, mechanical, and chemical purposes.

The government contended that the defendant had violated his license in maintaining the curtains and blinds, as is hereinafter stated; and offered evidence to show that on the day named in the complaint, from about seven to nine o'clock in the evening, the defendant kept and exposed intoxicating liquors

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with intent to sell the same, contrary to law, in his shop and the cellar of his premises in Lowell.

Two police officers of Lowell testified, in substance, that they visited the premises about eight o'clock on that evening, and, after having inspected the premises in the rear, entered the front door of the defendant's store, and in the front part of the store found the defendant attending to customers; that they then passed to the "back shop," so called, around a prescription desk in the back part of the front store, through an open door connecting the two rooms, and in the "back shop" found two men sitting, with the gas turned down; that one of the officers turned on the gas, and they then found several prescription glasses of different sizes standing upon a shelf over a sink; that one of the officers smelt of the glasses, and upon examination found that three had been used with whiskey and one with rum; that there was nothing else in either glass of the nature of a compound or otherwise; that on the shelf near the glasses was a demijohn with three or four quarts of whiskey, and the shelf there was wet with whiskey and showed marks where glasses had been placed; that the officers went down into the cellar, and found there a keg containing about twenty gallons of cider, and on a box near the keg was a glass wet with cider, and the box was wet with cider where the glass stood; that they also found two quart bottles of Bass's ale, recently opened, with a little of ale in each bottle, and there were other ale and liquor in bottles and barrels in the cellar; and one of the officers, on cross-examination, testified that he did not know whether or not they were empty; and that from the cellar the officers returned to the back shop, and as they returned the two men went out. This evidence was contradicted by the defendant.

The officers further testified as follows. There were two windows in this back shop; upon one of the windows were blinds, closed, and a curtain pulled wholly down; on the other window, near some stairs, there was no curtain, but there were boxes and barrels piled up in the back yard which obstructed the view to this window to some extent; on the side opposite to the back shop were a tenement house and a livery stable, but no view of any public street could be obtained from the back

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shop, and the windows were not visible from any public street; the officers then passed back into the front shop, where the defendant was waiting on customers; they called the defendant's attention to the prescription glasses and to the condition of the shelf on which the glasses and demijohn were, and the defendant made no reply; and, upon request of the officers, the defendant got his book showing sales of liquor, but there were no sales recorded that day. The officers further testified that on that night, previously to their entry into the front store, they had been in the rear and back yard of the premises, and found the blinds closed and curtain drawn down so they could not see into that window; and that they could not see into the other window on account of the boxes and barrels piled against it.

The defendant objected to the introduction of any evidence showing or tending to show that the blinds were closed, or that the curtain was drawn over the window, upon the following grounds: first, that the complaint did not charge that § 12 of the Pub. Sts. c. 100, or any other provision of law relative to blinds or curtains, had been violated by the defendant; secondly, that § 12 did not apply to licenses of the sixth class; thirdly, because there was no proof that the licensing board of the city of Lowell had cautioned, requested, or warned the defendant as licensee to remove the blinds and curtains, and not permit the same to be placed or maintained upon the windows, or either of them, during the period of the license.

The defendant objected to the introduction of evidence as to the alleged condition of the prescription glasses, because they were implements of traffic proper, necessary, and indispensable to the legal carrying on of the drug business; and because their alleged condition as found by the officers was not inconsistent with but natural to the legal carrying on of the business.

The defendant also objected to the introduction of any evidence as to the cider in the cellar, because the government offered no evidence that the cider contained more than one per cent of alcohol.

The defendant further objected to the evidence of the officers calling the attention of the defendant to the alleged condition of the prescription glasses, and the shelf on which they stood, because the officers testified that the defendant made no reply to the alleged remark by the officers.

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The judge instructed the jury, that, if the circumstances were such that the defendant was called upon fairly to reply to what the officer said, and he failed to reply, that might be considered by the jury in passing upon the case.

The evidence as to finding the demijohn of whiskey on the shelf by the officers was objected to by the defendant as being not inconsistent with the proper carrying on of the drug business.

The defendant offered evidence tending to show that the two men found sitting in the back shop by the officers had been for a long time intimate personal friends of the defendant, and were in the habit of dropping in there frequently for social purposes of reading and conversation, and that they had frequently been there, and more especially on Sunday evenings, and never at any time had either of them drunk any intoxicating liquor on the premises, or been seen drinking by any other person or persons; but, on cross-examination, they testified that they were in the habit of using liquor. One of them further testified that, immediately after the officers left the back shop, he smelt of the prescription glasses and found that neither of them smelt of rum or whiskey, or any other kind of intoxicating liquor; and that the glasses did not stand on a shelf over the sink, but that the glasses stood on a shelf at the left hand of the door leading from the front store to the back shop.

The defendant put in evidence a plan of the shop, and offered evidence tending to show that the testimony of the police officer called by the government could not have been true for two reasons: first, because it was impossible to look into the back shop from the place or places where he testified he stood; secondly, because a prescription case, standing five feet nine inches high from the level of the floor, completely obstructed the view to the back shop, and prevented any person standing where the witness stood, or at the front entrance of the store, from seeing whether the persons entered the back shop or not.

The police officer further testified, against the defendant's objection, that at three different times, namely, on March 13, 1892, March 6, 1892, and the last Sunday in February, 1892, he saw various persons enter the front store and go therefrom behind the prescription case into the back shop, and also return from

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behind the prescription case; and one other witness for the government testified that, on the morning of March 13, and once shortly prior thereto, he had seen several other persons go behind the prescription case. Both witnesses testified that none of the men who so went behind the prescription case brought out anything in their hands; but both witnesses testified, on cross-examination, that all of the persons were respectable appearing men, and showed no sign of intoxication.

The defendant also offered evidence that on said Sundays, in the front part of the store, on the counter, he kept for sale the so called Sunday newspapers.

The defendant asked the judge to rule that, upon all the evidence, the defendant was entitled to a verdict of acquittal. The judge denied this request, and submitted the case to the jury; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. F. Manning, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

ALLEN, J. 1. No legal or constitutional right of the defendant was violated by the refusal of the presiding justice to postpone the trial, or to adjourn the court to Lowell. *Commonwealth* v. *Hurley*, *ante*, 159.

2. The provisions of Pub. Sts. c. 100, § 12, forbidding licensees to place or maintain screens, blinds, curtains, etc., in such a way as to interfere with a view of the business conducted upon the premises, apply to licensees of the sixth class as well as to all other licensees; and it is provided by St. 1882, c. 259, that the placing or maintaining of any such obstructions shall of itself make the license void. See *Commonwealth* v. *Sawtelle*, 150 Mass. 320; *Commonwealth* v. *McDonnough*, 150 Mass. 504.

3. It was not necessary to insert in the complaint an averment that the provisions of Pub. Sts. c. 100, § 12, as to screens, blinds, curtains, etc., had been violated. *Commonwealth* v. *Barnes*, 138 Mass. 511. If further information was wanted, an order for a specification might have been asked for, and granted or refused in the discretion of the judge. *Commonwealth* v. *Wood*, 4 Gray, 11.

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4. It was not necessary to aver or prove that the licensing board had required the defendant to remove the blinds and curtains. *Commonwealth* v. *Rourke*, 141 Mass. 321.

5. The fact that the windows opened upon private grounds did not render it incompetent to prove that the view throug' the windows, or through one of them, was obstructed. *Commonwealth* v. *McDonnough*, 150 Mass. 504. Evidence of attempted concealment was competent to show both that the license was void and that the business was in other respects illegal.

6. All of the evidence relating to the keeping and use of liquors, and to the glasses, bottles, and vessels in which liquor was or had been contained, was competent for the consideration of the jury. The fact that a particular piece of evidence was not conclusive of guilt did not render it inadmissible.

7. The evidence of finding in the back shop two men sitting with the gas turned down, when taken with other evidence tending to show a recent use of liquor there, was competent.

8. The evidence that the officers called the defendant's attention to the condition of things in the back shop, and that he made no reply, was competent. The circumstances were sufficiently suspicious to warrant a finding that they naturally called for an explanation. *Commonwealth* v. *Brown*, 121 Mass. 69, 80. *Commonwealth* v. *Kenney*, 12 Met. 235.

9. It was not necessary to prove that the cider contained more than one per cent of alcohol. St. 1888, c. 219. Pub. Sts. c. 100, § 27. *Commonwealth* v. *Snow*, 133 Mass. 575. *Commonwealth* v. *Whelan*, 134 Mass. 206, 210.

10. It was competent to prove that at other times near the date of the alleged offence persons were seen going into and coming out from the defendant's back shop under circumstances which the jury might deem suspicious. *Commonwealth* v. *Finnerty*, 148 Mass. 162.

11. The evidence was sufficient to warrant a conviction.

12. If a druggist sells intoxicating liquors in violation of his license, it is not unconstitutional to impose upon him a penalty or punishment, in addition to providing by statute that his license shall be void. *Commonwealth* v. *Kinsley*, 133 Mass. 578. *Commonwealth* v. *Kiley*, 150 Mass. 325.

Exceptions overruled.

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COMMONWEALTH *vs.* WILLIAM McKENNA.

Middlesex. January 31, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Illegal Keeping for Sale — Evidence.

At the trial of a complaint for the unlawful keeping for sale of intoxicating liquors, there was evidence that the defendant kept a store, which was in a block occupied by other tenants, and adjoining his store was an unoccupied store, each having a door opening into a common entry-way in the rear; that during the time covered by the complaint a large quantity of liquors was found in an ice-chest in the unoccupied store; that on another occasion a quart of whiskey in a bottle was found by an officer, in the defendant's absence, in the cellar of the building, into which a stairway led from the defendant's store; that the defendant lived with his grandmother, about one hundred or one hundred and fifty yards from his store; that her house was searched by the police, who found concealed under a trap-door in the floor of the kitchen two quart bottles containing whiskey and two empty jugs smelling of whiskey; that the defendant went back and forth from his store to this house when he took his meals, and also at other times; that on one occasion a pint bottle half filled with lager beer and eight empty lager beer bottles, and on another occasion a glass which smelt of whiskey, were found in the defendant's store, and in his presence; and that on different occasions men under the influence of liquor were seen in and about the defendant's premises. The judge refused to rule, as requested by the defendant, that there was not sufficient evidence to justify a verdict of guilty. *Held*, that the defendant had no ground of exception.

At the trial in the Superior Court, on appeal, of a criminal case, a witness cannot testify to what he heard another person, who is ill and unable to attend the trial, testify to at the trial of the case in the lower court.

COMPLAINT, to the First District Court of Eastern Middlesex, alleging that the defendant, on January 1, 1892, and on divers other days and times between that day and February 26, 1892, the date of the complaint at Malden, unlawfully exposed and kept for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth. Trial in the Superior Court, before *Fessenden*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence for the government that the defendant was a pedler and provision dealer, and kept a store in Malden. The store was in a large block, in which there were eight or ten tenants, and there was an unoccupied store adjoining the store

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of the defendant, but having no direct connection with his store, although it was connected by a door leading into an entry-way in the rear of the defendant's store. A door opened into the entry-way from the defendant's store.

Evidence was introduced that on February 22, 1892, fifty-two bottles of lager beer and four quarts of whiskey were found on ice in a chest in the unoccupied store, and three empty lager beer cases were found in the same place. The owner of the building testified that he did not let the store to any person, and did not occupy it himself. There was no evidence, except such as appears in this bill of exceptions, that the unoccupied store was used, controlled, or in any manner occupied by the defendant, or that he had any key to the door of the same, or that he had access to it in any way during the time covered by the complaint. The lock on the door was an ordinary lock.

There was evidence that on January 5, 1892, at a time when the defendant was not present, a quart of whiskey in a bottle was found by an officer in the cellar of the building in which the store of the defendant was situated. There was a stairway leading from the defendant's store to the cellar, and there were two other stairways leading from the premises of other tenants to the cellar, which was not divided off or partitioned, but permitted an unobstructed passage under the whole block.

The defendant lived with his grandmother, Catherine Kearns, about one hundred or one hundred and fifty yards from the store. The police searched the house of Mrs. Kearns, and in the kitchen, under a trap-door in the floor, were found concealed two quart bottles containing whiskey, and two empty jugs smelling of whiskey. It was shown that the defendant went back and forth from his store to this house when he took his meals, and also whenever he desired to do so at such times as he was not on the road engaged in peddling provisions. There was no evidence that anything was brought by him from the house to the store, nor was there any evidence of any other person passing or being sent as messenger between the store and house.

There was evidence, admitted without objection, that Mrs. Kearns was seventy-three years of age, and was ill and unable to appear in court. The defendant offered to prove that Mrs. Kearns claimed the liquor found at her house as her own, and

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for this purpose asked, on cross-examination, the chief of police of Malden, who was a witness for the government, and who was not inquired of as to this matter by the district attorney, if he heard the testimony of Mrs. Kearns when a witness at the trial of this case in the lower court. He testified that he did. The defendant thereupon asked him what Mrs. Kearns testified as to the ownership of the liquors found in her house. The judge excluded the question; and the defendant excepted.

There was evidence that quite a number of men congregated around the corner where the defendant's store is situated, and that some of them were sometimes under the influence of liquor; that on one occasion when the defendant was present, during the time covered by the complaint, a pint bottle was found in the defendant's store half filled with lager beer, and also eight empty lager beer bottles; that on another occasion, when the defendant was present, there was a whiskey glass which smelt of whiskey; that quite a number of young men were about the store of the defendant, and many of them were seen by officers sitting about the stove in the back room of the store, from which a door opened into the entry-way before mentioned; and that on different occasions men were seen in the store and in the back room, and in the presence of the defendant, under the influence of liquor.

There was no evidence that the defendant bought or sold, or delivered, or had possession of any intoxicating liquors during the time covered by the complaint, unless the same may be inferred from the evidence hereinbefore set forth.

The defendant asked the judge to rule that there was not sufficient evidence to justify a verdict of guilty; but the judge refused so to rule.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

P. J. Doherty & E. D. Sibley, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

FIELD, C. J. We are of opinion that the evidence recited in the exceptions was sufficient to warrant the verdict of the jury.

The remaining exception is to the refusal of the court to permit a witness to testify to what Mrs. Kearns testified to at the trial of this case in the district court, she being ill and unable to

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be present at the trial in the Superior Court. The witness heard her testimony, and we assume that it was material. On this question there is a conflict of authority in other jurisdictions, but here, so far as we know, the practice has been to confine such testimony to cases where the witness has died; and the weight of authority elsewhere in criminal proceedings is, we think, that the rule should not be extended to cases where the witness is ill at the time of the trial. *State* v. *Staples*, 47 N. H. 113. *People* v. *Newman*, 5 Hill, (N. Y.) 295. *Le Baron* v. *Crombie*, 14 Mass. 234. *Commonwealth* v. *Richards*, 18 Pick. 434. *Yale* v. *Comstock*, 112 Mass. 267. *Costigan* v. *Lunt*, 127 Mass. 354. *Chase* v. *Springvale Mills Co.* 75 Maine, 156. *United States* v. *Angell*, 11 Fed. Rep. 34. *Collins* v. *Commonwealth*, 12 Bush, 271. See *Reynolds* v. *United States*, 98 U. S. 145; 1 Greenl. Ev. §§ 163–165; Best on Ev. (Chamberlayne's ed.) § 496, n.; Whart. Crim. Ev. (9th ed.) § 227 *et seq.*; 1 Bish. Crim. Proc. (3d ed.) § 1195; 1 Taylor Ev. § 477 *et seq.* The decision in *Le Baron* v. *Crombie*, *ubi supra*, has never been overruled, and the statutes since passed relating to evidence and witnesses seem not to touch the question. *Exceptions overruled.*

COMMONWEALTH *vs.* PATRICK CANNY.

Suffolk. January 30, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Illegal Keeping for Sale — Presumption.

At the trial of a complaint for the unlawful keeping for sale of intoxicating liquors, there was evidence that the defendant kept two stores, in which was a large stock of groceries; that, five years previously, he had a license for the sale of intoxicating liquors in one of the stores, but had none at the time of the complaint; that when he had the license the premises contained all the fixtures and paraphernalia of a bar-room, and remained unchanged materially at the date of the complaint; that at the latter date a police officer visited the premises with a search-warrant, and found the defendant there; that, as the officer passed in back of the bar, the defendant went into his office, and the officer heard the click of the safe as if some one was closing it; that the officer asked the defendant to open the safe, and he said he had no key, and left the premises; that he returned subsequently, and, upon another request by the officer and after some hesi-

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tation, opened the safe, which was found to contain a large quantity of intoxicating liquors in flasks which were free from dust; that the officer found in this store a number of empty lager beer bottles, and also whiskey glasses and two empty jugs smelling strongly of whiskey; that there was a drawer under the bar with a bowl of sugar in it and a spoon in the bowl, and the edge of the drawer was wet and smelt of whiskey; that the officer also searched the other store, and found in the cellar of the premises a large quantity of liquors in barrels and casks, and the faucets in the barrels, the measures and pumps all showing recent use; and that on several occasions a meal bag containing what appeared to be a jug was seen to be carried from one store to the other. *Held*, that the evidence was sufficient to warrant a verdict of guilty.

At the trial of a complaint for the unlawful keeping for sale of intoxicating liquors, it appeared that the defendant kept two stores, in which was a large stock of groceries; that a large quantity of intoxicating liquors was found in each place, some in flasks concealed in the safe in one store, and some in barrels and casks in the cellar under the other store; and that the defendant previously had a license, which had expired, to sell intoxicating liquors at the former store, in which the usual fixtures and paraphernalia of a bar-room were contained in an unchanged condition at the date of the complaint. The judge refused to rule, as requested by the defendant, that, "in considering the evidence, the jury are to presume that the goods in question were kept for legal purposes, unless the government has shown to the contrary"; and instructed the jury, in effect, that they must be satisfied, beyond a reasonable doubt, on the evidence, that the liquor was kept by the defendant with the intent to sell it, either by himself or by his servants, in violation of law, or the verdict must be not guilty; and that there was no presumption that the liquor found in the stores of the defendant was kept by him with intent to sell it in violation of law. *Held*, that the defendant had no ground of exception.

COMPLAINT, for unlawfully exposing and keeping for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth, on March 25, 1892, at Boston. Trial in the Superior Court, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

George E. Saxton, a police officer of the city of Boston, testified substantially as follows: "I know the defendant; his place of business is 441 and 445 Hanover Street, also has a store 431 and 439 Hanover Street, corner of Salutation Street. I went to the latter place, March 25, 1892, with officer Harris; I had a warrant for each of the places; I left the officer at 431 and went to 445 myself near two o'clock P. M.; found the defendant sitting just outside of his office door there, and told him my errand; he said that he was the proprietor. At the back of the store is a long bar, runs mostly the length of the store; there was a man in back of this counter; I stepped in back of the counter; while I was in there the defendant got up and

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went into his office; I heard the click of the safe, as if some one was closing it; there was nobody in the office but him; I came out after making search of the back part of the place, and asked him to open the safe; he said he had no key, . . . and very soon afterwards he put on his hat and went away, and I proceeded to search the place there. I found all the fixings of a bar in back of this place; the place was used in 1887; he had a license then, and these bar fixtures, beer-pump, and bottles in all the windows, remain as it was at that time; the pump is not in use; there is a place for glasses and drainers; found quite a number of lager beer bottles there empty, some tonic beer bottles full, some glasses, quite a number of lager beer glasses, and some whiskey glasses. Found together two empty half-gallon jugs, smelt strongly of whiskey; five empty pint flasks; five lager beer bottles in a basket; two glasses there. While I was attempting to search the premises, the defendant returned with his counsel, and I told him again I wanted to look into his safe, and he said he would open the safe under protest, and after some talk and hesitation he opened the safe in my presence and that of officer Harris. When he opened the safe I looked in it. I said that is just what I expected to find, and the defendant replied that it was all his personal property. I found in the safe nineteen pint flasks, full of different kinds of liquors, eleven pint flasks of whiskey, three pints of brandy, three pints of gin in three flasks, two pints of wine in two flasks, and some account-books, bills, and cash. I have come by this place a great many different times; have seen parties go in and out, looked as if they might be seafaring men, longshoremen. He claims to carry on a grocery business in this place. I saw boxes of stuff piled up, in such a way as to obstruct the view somewhat over the whole of the store, unless you take pains to look as you come in. There is a sign in the middle of the place between the doors, and bottles in the window labelled 'brandy, whiskey, gin, wine, porter.' The sign is marked 'Wholesale Dealer in Wines, Liquors, etc.' I went into the other store, 431 and 433, a double store. I found one of the defendant's men in there back of the counter, a man I had seen in the other place frequently, also about the premises back and forth between the two stores. I said nothing to the

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man; I went down cellar, directly underneath the retail department. It is divided in the middle by partition in the form of two stores. I have seen the defendant in there at different times looking about the place, and I have seen him back and forth with the team of the store. The cellar is divided by partition into two cellars, with a flight of stairs to each. I found a large quantity of liquor in one of the cellars. There were two tiers of barrels, whiskey casks, wine, gin, etc. All these barrels had brass faucets in them, and the bungs were all started. There were eleven casks of liquor. I seized fifty gallons of whiskey in two casks, forty gallons of rum in one cask, forty gallons of brandy in two casks, twenty gallons of gin in nineteen bottles, fifty gallons of wine in one cask, one hundred and sixty-eight bottles of ale, two pumps, such as used by wholesalers for pumping out liquors in casks, five measures, large and small, from five gallons down to a quart. I seized a proof glass, used in testing liquors, a bit and bit-stock, a bung starter, one pail, a lot of capsules, such as are put over the tops of bottles, made of tinfoil or something of that sort. I saw, underneath some of the barrels, drippings from the faucets, which looked as if they had been recently used; the measures were wet with liquors; one of the pumps showed very recent use. I found corks for jugs and corks for bottles, all lying round, showing they had been used right along. Brandy was in cases, some of it. Found some of the cases broken; one case of brandy with five full bottles, another with twelve full bottles, room for seven more in that case. Some boxes would hold two dozen bottles, and some would hold four dozen. Found two boxes with gin in them. One of these packages had been broken; in the other were a dozen bottles. In the other cellar was a cask of rum; it was not opened at all. It did not have any tag on it. On each of all the other barrels was an old-looking card, on which were the words, 'On storage for P. Canny"; on the reverse side was printed his name and business address. There was an empty alcohol barrel upon which was the government stamp, dated November 28, 1891. On another barrel, which contained proof spirits used by rectifiers, was a stamp, dated February 13, 1892. On another barrel, new and clean, looking as if it had recently come in, the stamp was

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dated March 5, 1892. I left quite a large lot of liquor because the amount exceeded the amount called for in my warrant. The cask of rum, on which was no card, had on a stamp dated February 4, 1891. I have seen men tending store in both places. I have seen people going in and out there, Italians, Portuguese, and Irish."

It appeared, on cross-examination of Saxton, that the defendant's store 441 Hanover Street was called the "North End Coöperative Store," where there was a wholesale and retail grocery business carried on; that at the defendant's store 445 Hanover Street there were signs over the door and other places with the words "P. Canny, Wholesale and Retail Liquor Dealer," the signs having stood there for a number of years; that there was a large number of old bottles in the windows of the store for years; that the defendant had formerly been in the liquor business in the place, and had formerly a license to sell intoxicating liquors, but at the time in question had no license; and that the interior of the premises was not materially changed from the condition it was in at the time he carried on business under a license, except that at the time set forth in the complaint there were large stocks of groceries in the cellars and stores.

Samuel L. Harris, a police officer of the city of Boston, testified to the same facts in substance as did Saxton, and in addition, that he went to 445, and went behind the bar; that the flasks taken from the safe were free from dust; that there was a drawer under the bar with a bowl of sugar in it and a spoon in the bowl; that the edge of the drawer was wet, and it smelt of whiskey; that some of the jugs had recently contained whiskey, and several more had no traces of whiskey in them; and that two whiskey glasses smelt of whiskey.

It appeared, on cross-examination of Harris, that he had seen one McElaney, employed by the defendant, at both the stores described by Saxton; that the defendant claimed at the time of the seizure that the packages of liquors in question were old packages that had been in his place ever since he carried on business under a license; and that he had not sold or kept for sale any liquor contrary to law.

Daniel H. Sullivan, a police officer of the city of Boston, testified in substance that he had been on this route for two

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years; that he had seen people going in and out of the defendant's store, the same as in any other shop on the street; that he never saw any liquor there, nor any intoxicated person; and that he had seen packages taken from one store to the other, but saw no liquors carried to or from the store.

Elmer W. Jones, a police officer of the city of Boston, testified substantially as follows: "I have seen the defendant and McElaney at both places; have seen packages of goods go from one place to the other; have seen boxes and barrels go from one store to the other. On three occasions I have seen what appeared to be a jug in a bag go from the store 431 to 445, — a bag such as is used for corn or meal, and something in the shape of a two-gallon jug in the bag. No. 445 is kept open late at night; it is not closed till half past eleven o'clock."

On cross-examination, Jones testified that he did not know what the contents of the bag were, and also in substance testified as did officer Sullivan on cross-examination.

Cornelius F. Regan, a police officer of the city of Boston, testified substantially as follows: "I am on that route nights from six to one; I have seen the defendant at each place; have seen boxes brought from one store to the other in a wheelbarrow by men employed by him, but did not know the contents of the boxes; have seen McElaney there; the place is open till after half past eleven; never saw any liquor or intoxicated person there."

On cross-examination, Regan testified in substance as did officers Sullivan and Jones.

Neither Sullivan nor Regan gave any testimony about any bag passing between the premises. All of them testified that there was a large stock of groceries carried in each of the stores continuously.

The defendant called as a witness Charles Holmes, who testified as follows: "I am a salesman for the North End Coöperative Store, and was in the store from two to five times a day, except Saturday; was there from one to two hours in the morning, and about the same time in the evening, and helped if there was anything to do. I sold goods at the grocery stores all over the city, and sometimes out of town: we did a retail and wholesale business. I was paid a salary. Everything

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in the wholesale was in 439. I never saw liquor sold there. I am the only traveller. I believe there is a man who has sold goods on commission. Go twice a day into 441 and 445, where the bottles were seized from the safe. I was supposed to show samples. The doors of 441 and 445 were open when the weather was suitable, and it was, like every other store, open to the public. We used to test canned goods at the bar. . . . The most business the defendant does is to collect his rents. He does this in his small office. He is the manager of the coöperative store, and deals very largely in canned goods."

Lewis M. Williams testified that he had business with the defendant at times in February, 1892; that he sold goods for him on commission; that he was in the store sometimes in the morning, and sometimes in the afternoon; and that he did not see any liquor or intoxicated persons in there.

John Jacobson testified that he was a grocer, and had had dealings with the defendant; that he had bought groceries of him often at the store; and that he never saw liquor there or intoxicated persons.

Cornelius P. Sullivan testified that he was a builder, and worked for the defendant, and was at his place daily for some time before the seizure of liquors, and up to and after it, and saw no drinking there, nor liquors, nor intoxicated persons.

The defendant asked the judge to rule as follows:

"1. The burden of proof is on the government to show that the goods in question were kept for illegal sale, or exposed for illegal sale, beyond a reasonable doubt. 2. In considering the evidence, the jury are to presume that the goods in question were kept for legal purposes, unless the government has shown to the contrary. 3. The government is bound to show that the goods in question were kept or exposed for illegal sale beyond a reasonable doubt. 4. There is no evidence that the defendant exposed for sale any spirituous or intoxicating liquors. 5. There is no evidence that the defendant sold any spirituous or intoxicating liquors."

The judge declined to rule as requested, and instructed the jury that there was no evidence that the defendant had a license to sell intoxicating liquor, and if the defendant kept the liquor which was found by the officers with intent to sell it at either

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of the stores described, such sales would be illegal, and the keeping of such liquor for such purpose was an illegal keeping; that it was not necessary for the government to show that the defendant kept the liquor to be sold by himself, if it was kept for sale by him, it was not material whether he was to sell it himself or by his agent or servant; that it is not necessary for the government to show that the defendant himself, or his servants exhibited the liquor to any one and offered it for sale to such person, or gave notice to persons that he kept it for sale; that it was sufficient for the government to prove that the liquor, or a portion of it, was kept by the defendant with intent to sell it in violation of law as he had opportunity at the premises described; that there was no direct evidence of any sales of liquor at the premises described; that the government relied upon the facts and circumstances testified to by the witnesses as being sufficient to warrant the inference that the liquor in the safe and in the cellar was kept by the defendant with the intent to sell the same in violation of law; that there was no presumption that the liquor was so kept by the defendant; and that the jury must be satisfied, on the evidence, that the liquor was so kept by the defendant beyond a reasonable doubt, or the verdict must be not guilty.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. F. Donnelly, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

FIELD, C. J. The evidence was amply sufficient to warrant the jury in finding that the defendant kept intoxicating liquor for sale in violation of the statutes. The only specific exception argued by the counsel for the defendant is to the refusal of the court to rule that, "in considering the evidence, the jury are to presume that the goods in question were kept for legal purposes, unless the government has shown to the contrary." The court instructed the jury, in effect, that they must be satisfied, beyond a reasonable doubt, on the evidence, that the liquor was kept by the defendant with the intent to sell it, either by himself or by his servants, in violation of law, or the verdict must be not guilty, and that there was no presumption that the liquor

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found in the stores of the defendant was kept by him with intent to sell it in violation of law. This was a correct statement of the law, and we think it was adequate.

Exceptions overruled.

COMMONWEALTH *vs.* CHARLES F. CRANE.

Suffolk. January 31, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Oleomargarine — Sale from Wagon without Placard "on both sides" — Statute.

A complaint under the St. of 1891, c. 412, § 4, for selling oleomargarine from a wagon, at a time and place named, the defendant "not having then and there on both sides of said vehicle the placard, in uncondensed Gothic letters not less than three inches in length, 'Licensed to sell Oleomargarine,'" is supported by proof that the defendant's wagon was a covered one, with the front and rear ends open; that on the inside of the cover on each side was a placard, in form and size such as the statute requires; that these placards could be seen from the front and rear of the wagon, but could not be seen from the sides thereof; and that there were no placards on the outer sides of the wagon.

At the trial of a complaint under the St. of 1891, c. 412, § 4, for selling oleomargarine from a wagon, at a time and place named, the defendant "not having then and there on both sides of said vehicle the placard, in uncondensed Gothic letters not less than three inches in length, 'Licensed to sell Oleomargarine,'" the defendant has no ground of exception to the refusal of the judge to rule that this section of the statute "is in conflict with the act of Congress of August 2, 1886, and the rules and regulations of the commissioner of internal revenue thereunder, and is therefore unconstitutional and void."

LATHROP, J. This is a complaint under the St. of 1891, c. 412, § 4, for selling oleomargarine from a wagon, at a time and place mentioned, the defendant "not having then and there on both sides of said vehicle the placard, in uncondensed Gothic letters not less than three inches in length, 'Licensed to sell Oleomargarine.'" The statute in question requires such a placard to be placed "on both sides" of the vehicle. The defendant's wagon was a covered one, with the front and rear ends open. On the inside of the cover on each side was a placard, in form and size such as the statute requires. These placards could be seen from the front and rear of the wagon,

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but could not be seen from the sides thereof. There were no placards on the outer sides of the wagon.

The defendant admits that the purpose of the act was to protect the public against fraud, and to provide an additional safeguard by requiring pedlers who sell oleomargarine from wagons, and have the opportunity to cheat and deceive, to notify the public that they deal in oleomargarine. He further admits that the purpose was that the placards should be placed where they could be seen. While we have no doubt that this is the purpose of the act, we cannot concede that the defendant has complied with it; and we are of opinion that placing the placards on the inside of the cover of the wagon was a mere device to evade the manifest intent of the Legislature.

The only other question which has been argued arises from the refusal of the court below to give this ruling: "That the section of this act which requires every one who sells and delivers oleomargarine from a cart, wagon, or other vehicle, to put on both sides of said cart, wagon, or other vehicle, the sign 'Licensed to sell Oleomargarine' is in conflict with the act of Congress of August 2, 1886, and the rules and regulations of the commissioner of internal revenue thereunder, and is therefore unconstitutional and void."

The contention of the defendant is that the commissioner of internal revenue has made certain regulations which require the place of business of a person intending to sell oleomargarine to be stated, and that the license issued to him states the place; and it said that selling from a wagon is not allowed. Hence it is argued that, as our statute compels a man to do that which is illegal and criminal under the federal law, our statute is unconstitutional and void.

There are several answers to this argument. The regulations of the commissioner of internal revenue are not made part of the report in this case; and we cannot assume the facts to be as stated by the defendant. There is nothing in the act of August 2, 1886, which is inconsistent with our law. The authority given to the commissioner of internal revenue to make all needful regulations for the carrying into effect of the act does not authorize the imposition of a penalty by a regulation where none is imposed by the act. *United States*

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v. *Eaton*, 144 U. S. 677. If the defendant had a license under the act of August 2, 1886, and has paid a tax, this affords him no immunity. Section 3 of that act, by incorporating § 3243 of the United States Revised Statutes into it, expressly repels the inference that the payment of such a tax will legalize the traffic, and implies that the prohibition or regulation of such traffic by State legislation is permissible. *State* v. *Newton*, 21 Vroom, 534.

As we find no error in the rulings of the justice of the Superior Court before whom the case was tried, according to the terms of the report the entry must be,

Verdict of guilty to stand.

H. M. Ayars, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

PATRICK F. KERRIGAN'S CASE.

Suffolk. January 30, 1893. — March 1, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Poor Debtor — Commitment to Jail for Contempt — Habeas Corpus — Statute.

A commitment of a poor debtor to jail for contempt, under the provisions of the St. of 1890, c. 128, is merely a proceeding in aid of other statutory provisions relating to the collection of judgment debts, and the debtor may obtain his discharge in any of the ordinary methods applicable to an arrest upon an execution; and there is nothing unconstitutional or illegal in such an imprisonment.

PETITION, filed January 24, 1893, for a writ of habeas corpus to the keeper of the jail at Cambridge, alleging that Patrick F. Kerrigan was unlawfully restrained of his liberty at the jail by such keeper. Hearing before *Morton*, J., who, at the request of the petitioner, adjourned the case into the full court; such entry to be made as the court should direct. The facts appear in the opinion.

F. P. Curran, for the petitioner.

H. E. Fales & S. H. Tyng, contra.

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ALLEN, J. The facts in this case, as ascertained partly from the recitals of the mittimus, and partly from the oral statements of counsel, are as follows.

The judgment creditors, having an execution against Kerrigan obtained in an action of contract, made application to the Fourth District Court of Eastern Middlesex for a certificate authorizing his arrest, upon the charge that he "has property not exempt from being taken on execution, which he does not intend to apply to the payment of the plaintiffs' claim." Pub. Sts. c. 162, § 17, cl. 1, § 18. Upon this application, notice was issued to Kerrigan to appear at a time and place therein fixed, and submit to an examination touching his estate. He accordingly attended before the court, and at the examination it appeared that, after the service of the notice and pending the examination thereon, he made a payment of money not exempt from being taken on execution with intent to prevent the same from being transferred or paid to the creditors or applied to the satisfaction of said execution, which payment was held by the court to have been a contempt of the court, under the provisions of St. 1890, c. 128. Accordingly, he was ordered to be committed to jail, there to be kept until discharged by said court, or otherwise according to law.

These proceedings were all regular in form, but it is contended on Kerrigan's behalf that the statute is unconstitutional, as giving to an inferior court power to punish criminally without right of appeal to a higher tribunal, and as giving a right to punish as a contempt an act not committed in the presence of the court, and that the commitment to jail is invalid, not being for a fixed time, and there being no way for him to obtain his discharge from imprisonment.

These objections are founded on a misapprehension of the statute, which is merely in aid of other provisions relating to the collection of judgment debts. Formerly executions against men usually ran against the body. There is nothing unconstitutional in imprisonment for debt, though it is now very much limited by statutes. Upon a charge like that made by the judgment creditors in the present case, no arrest on execution could now be made unless the court should be satisfied that there was reasonable cause to believe the charge true, and should indorse a

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certificate thereof upon the execution. No such certificate could be given without first allowing the judgment debtor whose arrest was sought an opportunity to be examined. But if after notice such debtor should fail to appear, the court might act upon proofs produced by the judgment creditors. If the court should be so satisfied, and should make the certificate authorizing the arrest, and if the arrest should accordingly be made, such judgment debtor after being so arrested might still on proper proceedings be admitted to take the poor debtor's oath, or might be relieved from arrest in certain other ways specified or recognized in the statutes. Pub. Sts. c. 162, §§ 17, 18, 31 *et seq.*, 44, 45, 46, 48; c. 157, § 83.

If one arrested on an execution makes an application to take the poor debtor's oath, not only may the whole subject of a charge like that upon which Kerrigan's arrest was sought be gone into, but under other provisions of statute charges of fraud may be filed against him involving acts deemed to be even graver violations of a creditor's rights. Pub. Sts. c. 162, §§ 17, 49–52. It has recently been held, upon great consideration, that the proceedings upon such charges of fraud are only a part of the proceedings upon the arrest, and that the provision for imprisonment is incident to the arrest for the benefit of the creditor, and not a substantive provision for the punishment of crime; and that accordingly a discharge in insolvency obtained pending the charges, and before a final judgment of guilty, will discharge the judgment debtor from the arrest and from the charges of fraud, in like manner as payment of the debt would do. *Everett* v. *Henderson*, 150 Mass. 411.

In like manner the commitment of Kerrigan in the present case is to be deemed to be merely in aid of the proceedings upon the execution; though it differs from the final judgment and sentence in case a judgment debtor is found guilty after a trial upon charges of fraud in this respect, namely, that the commitment is not to be considered as a final adjudication or sentence, and can have no greater force or effect than an arrest by virtue of a certificate authorizing the debtor's arrest on the execution would have. The provision in St. 1890, c. 128, is adapted from St. 1862, c. 162, § 8, re-enacted in Pub. Sts. c. 162, § 13, relative to women against whom judgments have been obtained. But

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women are not subject to imprisonment for debt, unless under proceedings for contempt. Pub. Sts. c. 162, §§ 3, 10, 13. In the case of men who are judgment debtors, a payment of money not exempt from being taken on execution with intent to prevent the same from being transferred or paid to the creditor or applied to the satisfaction of the execution is not included in the acts specified in § 17 as warranting an arrest in the first instance; but if this act is done after the service of the notice provided for in § 19, the Legislature resorted to the method of saying that it shall be deemed to be in contempt of court. It would seem that the same purpose would have been answered if the statute had provided that upon proof of such an act the court might make a certificate authorizing an arrest on the execution.

Looking at the nature of the act specified, and at the whole statutory system relating to arrest for debt, it seems clear that Kerrigan may obtain his discharge in any of the ordinary methods which would be open to him upon an arrest on the execution. He may pay the execution. He may obtain a discharge in insolvency. He may claim support in the jail as a pauper; and if the creditors fail to pay for his support the jailer must discharge him. The order for his commitment will terminate whenever he is legally entitled to a discharge in either of the ways provided by the statutes for the discharge of judgment debtors imprisoned on execution, or whenever the court shall see fit to discharge him.

Under this construction of the statutes, there is nothing unconstitutional or illegal in Kerrigan's imprisonment.

Petition for habeas corpus denied.

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HENRY W. HASKINS, administrator, *vs.* PHŒBE B. KENDALL.

Hampshire. September 20, 1892. — March 2, 1893.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Benefit Certificates — Statute — Resulting Trust.

A husband took out two benefit certificates in a mutual aid society, incorporated under the Pub. Sts. c. 115, and subject to the St. of 1885, c. 183, each certificate being payable to his wife, who died before him, leaving no issue. *Held*, that as there was no statute giving the wife a vested interest in the certificate, or no provision therein giving a right to her representatives, the contract was to be construed as payable to the wife only in case of her surviving her husband, and, that contingency having failed, there was a resulting trust in favor of his estate.

APPEAL from a decree of the Probate Court ordering Henry W. Haskins as administrator of the estate of Louisa G. Haskins to account for the proceeds of two benefit certificates issued by the Massachusetts Mutual Aid Society. Hearing before *Barker*, J., who reserved the case for the consideration of the full court, in substance as follows.

The Massachusetts Mutual Aid Society was incorporated on February 17, 1879, under the Pub. Sts. c. 115. After the passage of the St. of 1885, c. 183, it changed the form of its benefit certificates so as to conform to the provisions of that statute, and acted thereunder.

Jonathan H. Haskins, was the husband of Louisa G. Haskins. They had two children, both of whom died before 1887, unmarried.

Before the passage of the St. of 1885, c. 183, Jonathan H. Haskins became a member of the above named society, and took out two benefit certificates, each payable to Louisa G., his wife. On January 1, 1886, in order to bring the certificates under the provisions of the St. of 1885, c. 183, they were surrendered to the company, and in place of them two other certificates were issued, one for $3,000 and the other for $1,000, both payable, as before, to Louisa G. Haskins.

On June 11, 1888, the last mentioned benefit certificate for $1,000 was surrendered to the company, and another issued in its place, bearing the same date as the former, payable to one

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Hills of Amherst, upon a written request for a change of beneficiary, in the form required and used by the company, signed by both Jonathan H. and Louisa G. Haskins, the latter further releasing all interest and claim.

Hills was a creditor of Jonathan H., and the certificate was issued to him as security only. The applications for all the certificates and the payments of all assessments were made by Jonathan H., who continued a member of the society in good standing until the time of his death.

Louisa G. Haskins died on July 17, 1889, intestate, and Jonathan H. Haskins was appointed administrator of her estate on June 10, 1890, and as such administrator filed bond and affidavit of notice, and collected an insurance of $250 on her life, and paid her funeral expenses and debts, although he filed no inventory or account as such administrator. Jonathan H. Haskins remained unmarried, and died on January 4, 1891, intestate, and on January 13, 1891, Henry W. Haskins was appointed administrator of his estate, and on February 3, 1891, the same Henry W. Haskins was appointed administrator of the estate of Louisa G. Haskins (not administrator *de bonis non*), giving bonds in the estate of Jonathan H. in the sum of $500, and in the estate of Louisa G. in the sum of $3,500, and on December 11, 1891, giving an additional bond in the estate of Jonathan H. in the sum of $8,000. This appointment remained unrevoked, and also his appointment as administrator of the estate of Jonathan H.

After his appointment as administrator of the estate of Jonathan H., Henry W. Haskins applied to the officers of the society for the payment of the two benefit certificates. The company required him to furnish it with the receipt of an administrator of the estate of Louisa G. Haskins and the receipt of Henry F. Hills, as well as with the receipt of the administrator of the estate of Jonathan H. He therefore procured his own appointment as administrator of the estate of Louisa G., and procured a receipt of Hills, and made a receipt as administrator of the estate of Jonathan H., and another as administrator of the estate of Louisa G., and upon giving to the society these three receipts, about June 1, 1891, he received from the society the sum of four thousand dollars in payment of both certificates; and of this sum he paid Hills $454.28, and retained the balance.

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In the estate of Jonathan H. Haskins, Henry W., as administrator, filed an inventory on June 9, 1891, in which he stated as assets of that estate the two certificates, and they were appraised at the sum of four thousand dollars. In the estate of Louisa G. Haskins, Henry W., as administrator, filed an inventory on January 12, 1892, in which he mentioned the same certificates as insurance policies taken out for the benefit of the deceased by her husband, and stated that they were returned in the inventory of her husband, and the same were not appraised or carried out at any value in the inventory of the estate of Louisa G. Henry W. Haskins, on April 16, 1892, filed an account as administrator of the estate of Jonathan H. Haskins, in which he charged himself with the personal estate of said Jonathan H., according to the inventory, and charged himself in that estate with the full sum of four thousand dollars received by him from the two certificates. The hearing on the account was continued by the Probate Court to await the decision in this case. In the estate of Louisa G. Haskins he, on May 3, 1892, filed the account from the disallowance of which his appeal is taken, claiming that he had received no assets, and the decree disallowed that account, and ordered the accountant to charge himself with the proceeds of the two certificates.

The next of kin of Louisa G. Haskins living at her death were not of kin to Jonathan H. Haskins, and were never members of his family, nor dependent upon him for support.

C. L. Gardner, for the appellee.

J. I. Cooper, for the appellant.

LATHROP, J. It is not contended by the appellee that the certificates originally issued to Jonathan H. Haskins by the Massachusetts Mutual Aid Society for the benefit of his wife were not legally surrendered. It is contended in her behalf that the certificates issued in place of the original certificates, being issued after the passage of the St. of 1885, c. 183, vested such an interest in them in his wife, that, notwithstanding her death before that of her husband, the proceeds of the certificates upon their collection belong to her estate.

The applications for the certificates were made by Jonathan H. Haskins, and all assessments were paid by him. Even if this had been a case of life insurance, in the absence of any

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statute giving the wife a vested interest in the policy, or of some provision in the policy giving a right to her representatives, the contract would be construed as payable to the wife only in case of her surviving her husband, and on the failure of the contingency there would be a resulting trust in his favor. *Fuller* v. *Linzee*, 185 Mass. 468. *Bancroft* v. *Russell*, 157 Mass. 47.

While the rights of a wife and children are protected in the case of a policy of life insurance for their benefit, it has not yet been held by this court that, if they die before the person effecting the insurance, there would not be a resulting trust in his favor, in the absence of language in the policy giving rights to the legal representatives of the wife and children.

While the St. of 1885, c. 183, § 1, provides that, "if the benefit is to accrue through the death of the insured person, the contract shall be of life insurance," and by § 13 certain powers are given to the insurance commissioner which are conferred upon him by the Pub. Sts. c. 119, the same section provides that "nothing herein contained shall subject any corporation doing business under this act to any other provisions or requirements of said chapter, . . . except as distinctly set forth herein."

The contract in the case at bar does not, therefore, come within the provisions of the Pub. Sts. c. 119, § 167, but within the general rule above stated. While under a by-law of the society Jonathan H. Haskins could not transfer the certificates without his wife's written consent,* we are of opinion that this did not vest such an interest in her that her next of kin would be entitled to the proceeds of the certificates if she died before him.

It follows that the decree of the Probate Court must be reversed, and the case remanded to that court for further proceedings.

So ordered.

* This by-law was as follows: "Where the beneficiary is the wife of a member no transfer can be made except with her written consent, but in all other cases a member can change the beneficiary by return of certificate with request of such change in writing."

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FRANK CAREY *vs.* BOSTON & MAINE RAILROAD.

Worcester. October 5, 1892. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Crank of Hand-car — Assumption of Risk — Variance.

In an action against a railroad company for personal injuries occasioned to the plaintiff by being thrown from a hand-car in consequence of his clothing being caught by the crank of the car while he was turning the same, there was evidence tending to show that the part of the crank which was taken hold of consisted of a wooden piece through which passed an iron bolt on which the wooden piece turned as the crank revolved; that this iron bolt passed through the arm of the crank, and projected on the other side in all an inch and a half; that the part which projected had a thread cut on it, and a nut screwed down to the arm, the nut being half an inch thick, and the threaded screw projecting an inch beyond the nut. The plaintiff had been in the employ of the defendant for several years as a section hand, and the hand-car on which he was injured had been in use for several days. *Held*, that while there was evidence that some other hand-cars had the end of the bolt welded, and others had the nut at the end of the handle, there was no evidence that a handle made as this one was with a threaded screw projecting beyond the end of the nut was not a well known device, and the fact that it was more dangerous than other devices did not render the employer liable.

In an action against a railroad company for personal injuries occasioned to the plaintiff by being thrown from a hand-car in consequence of his clothing being caught by the crank of the car while he was turning the same, the declaration alleged that the pin or bolt became detached from the handle and then became entangled in the plaintiff's clothing, and that it became detached because it and other parts and attachments of the handle were insufficient and unfit for the use to which they had been applied, while the evidence was that while the plaintiff was turning the crank a bolt at the end of the crank took hold of his coat and threw him over and the car ran over him. *Held*, that there was a variance between the allegations and the proof.

TORT for personal injuries occasioned to the plaintiff by being thrown from a hand-car on the defendant's road. The declaration alleged that "the plaintiff, while in the proper performance of said employment, was engaged, together with other fellow servants of the defendant, in propelling a hand-car upon the tracks of the defendant in West Boylston in Worcester County, by means of a crank attached to and a part of said car; that while so engaged, and while in the exercise of due and proper care, a pin or bolt which formed part of the handle of said crank and

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also other parts and attachments of said handle became detached from said handle for the reason that said pin or bolt and said other parts and attachments of said handle were insufficient and unfit for the uses to which they had been applied; that directly said pin or bolt and said other attachments and parts of said handle became detached as aforesaid, said pin or bolt became entangled in the clothing of the plaintiff and he was thrown violently out of and in front of said car, and said car passed over the body of the plaintiff; . . . that said pin or bolt and said other parts and attachments were old, insecure, and unfit for the uses to which they had been put."

At the trial in the Superior Court, before *Maynard*, J., there was evidence tending to show that the plaintiff was a section hand employed on a section of the defendant's road; that on or about September 30, 1889, he went in the morning from Oakdale, the northerly end of the section, to nearly the southerly end of the section, a distance of three or four miles, and worked there on the road through the day; that at about six o'clock in the evening the plaintiff, the foreman, and the other sectionmen started back on the same car, and the plaintiff turned one of the two cranks by which the car was propelled, one of the other sectionmen turning the other; and that soon after starting the plaintiff's clothing was caught by the crank, and he was thrown out and received the injury complained of.

The plaintiff testified that he was fifty-four years old; that he had worked for the defendant several years, not constantly, but as a special section hand; that he worked on the day in question till about six P. M., when he started back; that it was about dark, growing dusk; that he felt obliged to take the crank as the others had taken seats; that he took the right-hand crank and another man the left-hand crank; that he buttoned his coat three or four buttons and began to turn the crank; that the grade was a down grade; that he was turning the crank in the usual manner and was going at ordinary speed; that a bolt at the end of the crank took hold of his coat and threw him over, and the car ran over him; that the bolt in the handle stuck out an inch or an inch and a half, and that he was pitched out like a gunshot, and that was all he remembered; that this car had been on the road four or five days; and that

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he turned the other crank coming down in the morning, but had never before turned the one that caught him.

One Shepard, called by the plaintiff, testified that he was one of the men in the gang at the time the plaintiff was hurt; that the grade was a down grade of about seventy-five feet in a mile; that it was a pretty good running car; that the bolt was a little too long; that it stuck out beyond the handle; that the part of the crank which was taken hold of consisted of a wooden piece through which passed an iron bolt on which the wooden piece turned as the crank revolved; that this iron bolt passed through the arm of the crank, and projected on the other side in all an inch and a half; that the part which projected had a thread cut on it, and a nut screwed down to the arm, the nut being half an inch thick, and the threaded screw projecting an inch beyond the nut; and that after the accident he found a piece of the plaintiff's coat caught on to the projecting end of the bolt, and twisted around the handle.

Shepard on being recalled testified as follows: "*Q.* How was this handle different, if different at all, from other handles on other hand-cars? *A.* Some other hand-cars would n't have that nut on there at all. It would be welded up. — *Q.* How about other hand-cars and this extension of the bolt? *A.* It would be put in the same way, only put in the handle. The bolt put in the same way and nut put on here [indicating the end of the handle]. — *Q.* On the other end? *A.* Yes."

The defendant offered evidence of the condition of the handle of the car, contradicting the evidence of the plaintiff.

The defendant requested the judge to rule as follows:

"1. That there was no evidence to warrant a verdict for the plaintiff. 2. That whatever defect there was in the hand-car was obvious, and as apparent to the plaintiff as to the defendant. 3. That upon the pleadings and proof the verdict should be for the defendant. 4. That there was no evidence that the projecting bolt or screw described by Shepard was a defect, and that, so far as appeared, it was a method of construction which the defendant had a right to adopt, even if it was more dangerous than some other method would be."

The judge declined so to rule; the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

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The case was argued at the bar in October, 1892, and afterwards was submitted on the briefs to all the judges.

F. P. Goulding, for the defendant.

E. J. McMahon & W. A. Gile, for the plaintiff.

LATHROP, J. In the opinion of a majority of the court, the instructions requested by the defendant should have been given. The plaintiff had been in the employ of the defendant for several years as a section hand. The hand-car on which he was injured had been in use for several days. While there is evidence that some other hand-cars had the end of the bolt welded, and others had the nut at the end of the handle, there is no evidence that a handle made as this one was, with a threaded screw projecting beyond the end of the nut, was not a well known device. The fact that it was more dangerous than other devices does not render the employer liable.

In *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261, the plaintiff was injured by a set screw projecting from the collar of a shaft. On the question whether this was a defect for which the defendant was liable, it was said by Mr. Justice Devens, in delivering the opinion of the court: "It cannot be claimed that the machinery used by the defendant was out of repair, or defective and unsuitable for the purpose. There was evidence on the part of the plaintiff that a recessed collar was in common use, so made that the set screw was sunk into the collar flush with its face, upon which there was much less liability of being caught than on that used by the defendant. But the plaintiff offered no evidence that the collar and set screw as used by the defendant were not also in common use." See also *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79; *Coombs* v. *Fitchburg Railroad*, 156 Mass. 200.

The danger of bringing one's clothes in contact with a revolving crank while in motion is an obvious one; and it cannot be said that, because this danger was somewhat increased by the device used, there was a defect in the machine. Whatever danger there was in the fact that the screw projected beyond the nut was as well known and as obvious a danger to the plaintiff as to the defendant. The plaintiff does not testify that he was ignorant of the fact; and he had ample opportunity of knowing all about it. He must, therefore, be held to have assumed and

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taken the risk of injury from that source. *Pingree* v. *Leyland*, 135 Mass. 398. *Williams* v. *Churchill*, 137 Mass. 243. *Moulton* v. *Gage*, 138 Mass. 390. *Leary* v. *Boston & Albany Railroad*, 139 Mass. 580. *Russell* v. *Tillotson*, 140 Mass. 201. *Taylor* v. *Carew Manuf. Co.* 140 Mass. 150. *Gilbert* v. *Guild*, 144 Mass. 601. *Wood* v. *Locke*, 147 Mass. 604. *Probert* v. *Phipps*, 149 Mass. 258. *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423. *Pratt* v. *Prouty*, 153 Mass. 333.

There was also a variance between the allegations and the proof. The declaration alleges that the pin or bolt became detached from the handle, and then became entangled in the plaintiff's clothing, and that it became detached because it and other parts and attachments of the handle were insufficient and unfit for the use to which they had been applied. The only defect alleged in the declaration is a condition which caused the pin or bolt to become detached. This was not supported by the proof. *Exceptions sustained.*

EUGENE J. TOOMEY *vs.* MICHAEL DONOVAN & another.

Essex. November 2, 1892. — March 2, 1893.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Negligence — Employers' Liability Act — Evidence — Assumption of Risk by Employee.

In an action for personal injuries by A. against B., it appeared in evidence that B. had an arrangement with C. by which C. had charge of a room in B.'s factory in which room A. was at work. C. hired and paid the men, and B. paid C. so much a case for fitting the stock. B. furnished the machinery, including the machine on which A. was injured, power, and everything except labor, and, as B. testified, looked out for the room, though he did not explain the phrase. If the stock was not fit C. informed B., and B. testified that C. had full charge and assumed the responsibility. Whether B. exercised supervision over the work was not clear. He was often about the room and kept the machinery in repair through one D., B. testifying that the arrangement was that he should pay for the repairs, and that C. had the right, if repairs were needed, to go to D. and get a man, and had done so several times; that he himself had given orders to do so, and had sent out to have some of the machines repaired after something that C. had told him; that he relied on C. to examine the machinery; that he had the right to inspect the machine himself, and was often in the room; and that he never hired anybody to clean the machines, but supposed C. would do it, though he

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had no agreement with him. B. also spoke of C. as his foreman. C. testified that he was to look after the machines and have them repaired, but was doubtful whether or not at B.'s expense, and that he had usually notified B. of what was needed, but did not expect B. to inspect the machines as a part of the arrangement. The judge directed a verdict for B. *Held*, that A. should have been allowed to go to the jury, both on the count at common law and the count under the St. of 1887, c. 270, § 4.

The inference from the St. of 1887, c. 270, § 4, plainly is, that the employer shall be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. By the negligence of the employer is meant his own negligence, in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employer is spoken of.

In an action for personal injuries it appeared in evidence that for a part of three years before the accident the plaintiff had worked upon a machine like that upon which he was injured; that he was twenty-five years old at the time and of ordinary intelligence; and that he knew that there was no automatic guard on the machine and no way of preventing the head block from coming down if the machine was out of order. *Held*, that, having assumed the risk of operating the machine without a guard, the plaintiff could not now claim that one should have been put on.

MORTON, J. The plaintiff contends that there was evidence tending to show that the defendants were liable at common law, and also under § 4 of the employer's liability act, St. of 1887, c. 270.

The defendants concede that the jury would have been warranted in finding that the plaintiff was in the exercise of due care, and that the machine was out of repair; but they insist that at common law there was no evidence tending to show that they were under any obligation to keep the machine in repair, or that they owed any duty to the plaintiff in that regard, and that under § 4 of the employers' liability act there was no evidence to show that its condition was due to their negligence, or that of any person intrusted by them with the duty of seeing that it was kept in repair.

Their contention at common law implies, and we think rightly, that, if they were bound to keep the machine in repair, the defect was of a sort to render them liable to the plaintiff, if they owed any duty to him to keep the machine in repair.

The defendants did not hire the plaintiff, and, we assume, had no authority to discharge him. He was at work in a room in

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their factory which was used for the stock fitting department. The defendants had an arrangement with one David W. Toomey by which he had charge of this room. Toomey hired and paid the men, and the defendants paid him so much a case for fitting the stock. They furnished all the machinery, including the machine on which the plaintiff was injured, knives, grooves, stamps, stock, power, and everything except labor, and, as one of them testified, looked out for the room, though he did not explain what he meant by that phrase. If the stock was not fit, Toomey informed the defendants; and one of them testified that Toomey had full charge of that department, and took the responsibility off his hands. Whether the defendants exercised any supervision over the work in the course of its manufacture is not clear. There was testimony that they were "about the room very often, sometimes most every day, sometimes three or four times a day, and sometimes . . . not for three or four days." On direct examination one of the defendants, called as a witness by the plaintiff, testified that they kept the machinery in repair, or, as he explained, "so that it would be all right to do the work in every way, shape, and manner." The witness said, in answer to an inquiry as to whom he employed to keep it in repair, "No one in particular," and then immediately added, "M. V. Bresnahan." On cross-examination he said that the arrangement was nothing more than an agreement that they should pay for the repairs, and that Toomey had the right, if there was any necessity to have any machine repaired, to go to Bresnahan and get a man, and had done so several times; that he himself had ordered them to do so, and had sent out to have some of the machines repaired after something that Toomey had told him; that he relied entirely on Toomey to examine the machinery; that he had the right and opportunity to inspect this machine himself, and was often in the room; and that he never hired anybody to clean the machines, but supposed Toomey would do it, though he had no agreement with him. The witness also, in the course of his testimony, spoke of Toomey as their foreman.

Toomey testified that it was his duty to look after the machines and have them repaired, and that he was the person who was to look out for defects; but he was not sure that

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he had power to have them repaired at the expense of the defendants without notice to them. He had usually notified the defendants of what was needed, and did not expect them to inspect the machines as a part of the arrangement with him.

It manifestly would have been competent, on this testimony, for the jury to find that the defendants were bound to keep the machines in repair; that Toomey, in what he did as to repairs, was acting for them; and that, under the arrangement between him and them, they contemplated that the machines would be operated by workmen employed by him. Under such circumstances, the defendants would owe to those employed on the machines the duty of exercising reasonable care to keep them in such a condition that they could be operated safely. If they engaged with Toomey to keep them in repair for use by his workmen, they would be liable to any one employed upon them by him who, being himself in the exercise of due care, was injured in consequence of their neglect to repair them. The liability of the defendants to the plaintiff would not depend on or arise out of any contract with him, but on their neglect of a duty which they had undertaken towards him in common with the other workmen employed by Toomey. It is not necessary to consider whether there would be any ground for holding the defendants liable if they had merely furnished the machines, and if there was no evidence that would warrant a jury in finding that they contemplated the use of them by workmen employed by Toomey, and had agreed to keep them in repair. It may be that Toomey also would be liable to the plaintiff; but neither that fact, nor the fact that Toomey might be liable to the defendants for breach of his agreement (if he did agree) to notify them when the machines needed repairing, would relieve the defendants from liability to the plaintiff for injury resulting to him from neglect by them of a duty which they owed to him. *Curley* v. *Harris*, 11 Allen, 112. *Kimball* v. *Cushman*, 103 Mass. 194. *Gray* v. *Boston Gas Light Co.* 114 Mass. 149. *Hayes* v. *Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457. *Bickford* v. *Richards*, 154 Mass. 163. *Heaven* v. *Pender*, 11 Q. B. D. 503. *Elliott* v. *Hall*, 15 Q. B. D. 315. *Smith* v. *London & St. Katharine Docks Co.* L. R. 3 C. P. 326. We think, therefore, that the plaintiff should have been allowed to go to the jury on the common law

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count. The plaintiff also contends that he should have been allowed to go to the jury on the count under § 4 of the employers' liability act, and it is necessary to consider that question.

The purpose of that section evidently was to enlarge the liability of the employer; otherwise, it is meaningless. The inference from the section plainly is that the employer should be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor, which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. If, therefore, there was a relation of employer and contractor, as appears to have been the case between the defendants and Toomey, as to any part of the former's work, and the plaintiff was injured by reason of a defect in any of the machinery furnished by them to Toomey for such work which arose from, or had not been discovered or remedied through, their negligence or that of some one intrusted by them with the duty of seeing that it was in proper condition, then the defendants would be liable. By the negligence of the employer, we understand to be intended his own negligence, in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employee is spoken of. There was evidence that the defendants were bound to keep the machine in repair, and that they had the right and opportunity to inspect it, and were frequently in the room where it was. Whether the want of repair was due in any respect to their own negligence was, we think, under the circumstances, a question for the jury. We cannot say that a jury would not be justified in finding that they should have examined the machine themselves, in the exercise of reasonable care. It has already appeared that there was evidence which would have warranted the jury in finding that Toomey was intrusted by the defendants with the duty of seeing that the machine was in proper condition. The fact that he also occupied towards them the relation of a contractor would not relieve the defendants from liability for his negligence in seeing that the machine was in proper condition.

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One person may sustain different relations to another, as well as different relations to different persons. Whether the want of repair was due to any negligence on the part of Toomey was also, we think, a question for the jury, and the plaintiff should have been allowed to go to the jury on the question of the liability of the defendants under § 4 of the employers' liability act.

The remaining question relates to the admissibility of certain testimony offered by the plaintiff, tending to show that for a long time prior to the accident automatic guards had been in use upon such machines, for the purpose of preventing the head block from coming down in case there was any defect in the machine, and that the defendants knew of such guards, and the plaintiff did not know of them. This testimony was excluded by the court, and we think rightly. For a part of three years prior to the accident, the plaintiff had worked upon a machine like that upon which he was injured. He was twenty-five years old at the time of the accident, and, for aught that appears, was of ordinary intelligence. He knew that there was no guard on the machine, and no way of preventing the head from coming down if the machine was out of order. The fact that there was no guard was an obvious one; and, in working on the machine, he must be held to have assumed the risk resulting from the absence of a guard. Whether he did or did not know that automatic guards were in use on such machines was immaterial. He agreed to work on the machine as it was, and the defendants owed no duty to him to put on the guard. Having assumed the risk of operating the machine without a guard, the plaintiff cannot now claim that one should have been put on. *Pingree* v. *Leyland*, 135 Mass. 398. *Moulton* v. *Gage*, 138 Mass. 390.

Exceptions sustained.

H. F. Hurlburt & E. T. McCarthy, for the plaintiff.

W. H. Moody, for the defendants.

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GEORGE S. FISK *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. November 17, 1892. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Assumption of Risk — Employers' Liability Act.

In an action for personal injuries it appeared in evidence that the plaintiff had worked before the accident for the defendant corporation, a railroad, at least two years, running all the time on the same division. One of the defendant's stations, at which the plaintiff had been a number of times by day and frequently by night, had a projecting awning, which had remained unchanged since the plaintiff had worked on the road and with which the plaintiff was familiar. All the principal stations on the road had similar awnings. On the night of the accident, which was dark and rainy, the plaintiff was on a car which came from another road, and which was higher than some cars and had a side ladder. The plaintiff had ridden on such cars before, not more than one in twenty of which was made with a ladder on the side, and on the average there would be one or two such cars in a freight train. The plaintiff started to get upon the ladder to go down, and in passing the station struck against the awning and was hurt. *Held*, that the defendant was not guilty of negligence in receiving and hauling such a car as a part of its train; that at common law the risk of the accident was one which the plaintiff must be held to have assumed, and that no remedy was given to him by the St. of 1887, c. 270, § 1, cl. 1.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ as a freight brakeman, by coming in contact with the wooden awning projecting from the defendant's passenger station at Greenfield. Trial in the Superior Court, before *Hopkins*, J., who, at the close of the testimony, ordered a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

J. D. Long & J. F. Wheeler, for the plaintiff.

G. A. Torrey, for the defendant.

ALLEN, J. The defendant's station at Greenfield had a projecting awning, to protect passengers in getting into or out of the cars from the rain. All the principal stations on the railroad had such awnings, and there had been no change in the one at Greenfield since the plaintiff had worked on the road. His work on the road began in 1886; it was not continuous, but before the accident he had worked on the railroad certainly

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two years, running all the time on the same division, from Fitchburg to Williamstown and back. He had been over the road both in the daytime and by night, never very much on the day trains, but had been by there a number of times in the daytime and frequently by night. He was acquainted with the station at Greenfield, and knew there was an awning there. On the night of the accident, which was dark and rainy, he was on a car which came from another railroad; the car was higher than some cars, and had a side ladder. He had ridden on such cars before; not more than one car in twenty was made with a ladder on the side; on the average, there would be one or two such cars in a freight train. The plaintiff started to get upon the ladder to go down, and in passing the station struck against the awning and was hurt. Such in substance was his testimony.

It was not contended, and could not successfully be contended, in behalf of the plaintiff, that the defendant was guilty of negligence in receiving and hauling such a car as a part of its train. *Mackin* v. *Boston & Albany Railroad*, 135 Mass. 201.

At common law, the risk of such an accident, under the circumstances stated, is one which the plaintiff must be held to have assumed. *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79. *Wood* v. *Locke*, 147 Mass. 604. *Illick* v. *Flint & Pere Marquette Railroad*, 67 Mich. 632.

Nor is a remedy given to him by the employers' liability act, St. 1887, c. 270, § 1, cl. 1. The condition of the awning had not been changed for the worse during the time of the plaintiff's employment upon the road; and it was not the duty of the defendant to alter it with a view of making it more safe. In order to afford a remedy under that clause of the statute, there must have been a defect in the condition of the awning which arose from or had not been discovered or remedied owing to the negligence of the defendant, or of some person in the defendant's service intrusted with the duty of seeing that the awning is in proper condition. Where there is no duty, there can be no negligence. The duty of altering the awnings upon its stations was not cast upon the defendant by the enactment of the statute. *O'Maley* v. *South Boston Gas Light Co.*, *ante*, 135, and cases there cited.

Exceptions overruled.

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LAWRENCE RILEY *vs.* WILLIAM E. HALE.

Middlesex. November 18, 1892. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Landlord and Tenant — Breach of Covenant for Quiet Enjoyment — Recoupment — Eviction — Measure of Damages — Evidence of other Leases.

If a lessor insists on the validity of his lease to the lessee for the purpose of collecting the rent reserved in it, he cannot treat the lease as invalid for the purpose of avoiding his implied covenant for quiet enjoyment; and if he takes judgment for the full amount of a year's rent without giving credit for rents received from other tenants, he cannot claim that such letting by him to other tenants was for the lessee's account.

The lessee's omission to avail himself by way of recoupment of the lessor's covenant for quiet enjoyment does not debar him from maintaining an action on such covenant.

Where the relation of landlord and tenant exists, the lessor is liable on his implied covenant for quiet enjoyment; if he intentionally puts it out of his power to deliver possession of the premises to the lessee, without the lessee's consent, the lessor's act is of the same nature as an eviction. If no rent has been paid the measure of damages is the difference between the agreed rental and the actual value; but where the lessee has been compelled to pay rent during the period of exclusion, the amount so paid is to be added, otherwise his actual loss by reason of the breach of the implied covenant will not be made good.

A. executed a lease of certain premises to B. from May 1, 1880, to April 30, 1883. B. not having taken possession, A. brought an action against him on October 21, 1881, and recovered judgment for one year's rent. In an action by B. against A. on A.'s covenant for quiet enjoyment, B. introduced in evidence, without objection, leases executed by A. to other tenants for the period from May 12, 1880, to April 30, 1881, and also from May 1, 1881, showing the rent agreed to be paid for those periods; and was also allowed to introduce, under objection, a lease by A.'s grantee to the same tenants from May 1, 1882, to April 30, 1884, showing the rent to be paid for that period. The ground of objection at the trial to the last lease was not stated, but certain grounds of legal distinction between that and the other leases were urged at the argument in this court. *Held*, that the first ground of distinction, that the defendant was not a party to the last lease, was immaterial, as the purpose was merely to show the rental value of the premises for the plaintiff's term; that the second ground, that there was evidence that the entire rent reserved was not paid, did not affect the competency of the evidence, but was only a matter for comment to the jury; and that as to the third, that the lease covered a period one year later than the term of the lease to the plaintiff, there being a gradual advance of the rents, it was to be assumed that, as the lease was admitted to show the rental value till April 30, 1883, proper instructions were given if asked for.

CONTRACT, by writ dated March 12, 1890. The first count of the declaration was for sixteen thousand five hundred dollars,

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being money had and received by the defendant to the use of the plaintiff for three years' rent of the premises in question. The second count was as follows:

"And the plaintiff says the defendant executed and delivered to him a written lease of a certain store, numbered 101 on State Street, in the city of Chicago in the State of Illinois, whereby the defendant, in consideration of a certain rent to be paid by the plaintiff, let said store to the plaintiff for the term of three years, and covenanted that plaintiff should have possession of said premises during said term, and should have the quiet enjoyment thereof; yet the defendant, wholly unmindful of said covenant, took possession of said premises, and excluded the plaintiff therefrom, and let the same to other persons throughout the whole of said term, whereby the plaintiff has lost the enjoyment of said premises and the profits thereof."

The answer alleged that the plaintiff had violated the conditions of the lease, and forfeited all rights thereunder, and that all money received as rent by the defendant was received not to the use of the plaintiff, but of the defendant, and of the owners of the premises in whose behalf the defendant acted in making the lease.

Trial in the Superior Court, before *Bond*, J., who reported the case for the determination of this court, in substance as follows.

The plaintiff introduced in evidence a lease from the defendant to the plaintiff of certain premises in Chicago, dated March 11, 1880, for a term beginning with that date and ending on April 30, 1883, for the rent of five thousand dollars per annum. The plaintiff also put in evidence the following letter, written by him to the defendant, dated Boston, March 22, 1880:

"I signed a lease of store 101 State St. in your city at $5,000 per year subject to reference to be approved by you, my individual resources is not sufficient to engage in business without the approval of Mr. Dwight Prouty, who I gave you as my backer, and also to whom I referred you, he withheld his support in the matter much to my disappointment, as I could not go on without his aid in matter of credit, in coming back from your city I submitted the proposition to him and he at once refused, and I supposed wrote you to that effect, as the signing of the lease by Mr. Hale depended on my references I gave it up as settled that you

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would not forward the lease under the circumstances of Mr. Prouty's disapproval."

No reply was received by the plaintiff to this letter. The plaintiff did not go to Chicago after the execution of the lease, and never entered upon the premises, or requested or demanded possession, or paid or offered to pay any rent for the same.

The plaintiff also introduced in evidence the record of the Superior Court for this county in the suit of the defendant against the plaintiff, showing that the defendant recovered judgment against the plaintiff for five thousand dollars, being one year's rent. The plaintiff further introduced evidence that in August, 1886, the defendant caused an execution on the judgment to be levied upon the property of the plaintiff, who on August 5, 1886, filed in the Supreme Judicial Court a petition for a review of the judgment and for a supersedeas of the execution; that a writ of supersedeas was issued upon the plaintiff giving a bond with sureties as required by statute, and the petition for review was afterwards dismissed. Suit was afterwards entered in the Superior Court upon the bond, and it was ordered that judgment thereon should be suspended to enable the plaintiff to bring this action and try the same, to allow an offset of judgment as provided by statute. The amount for which execution should issue in the suit on the bond was $7,136.38, being the amount of the original judgment for one year's rent, with interest to February 19, 1890, and costs.

It appeared in evidence, that on May 12, 1880, the defendant made a written lease of the premises described in said lease to the plaintiff, one half to one Hall at an annual rent of $1,800, and the other half to one Campbell at an annual rent of $2,200, to April 30, 1881; that in February, 1881, the defendant, with others interested in the block of buildings in which the leased premises were situated, conveyed the same in fee to one Higgins by deed, in which the defendant reserved the rents from Hall and Campbell to March 1, 1881, and that the defendant received as rent from Hall and Campbell, from May 12, 1880, to March 1, 1881, $3,222.22, and that he laid out one hundred dollars upon the premises to fit them for two tenants; and that at about the time of making the deed to Higgins the defendant made leases of the premises to Hall and Campbell, respectively, for one year beginning May 1, 1881, and ending April 30, 1882, by which they

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were to pay an aggregate rental of five thousand dollars per year, which was paid to Higgins, and that Higgins rented the premises to Hall and Campbell for the term of two years, beginning May 1, 1882, and ending April 30, 1884, at an aggregate annual rental of seven thousand dollars. The evidence as to the lease from May 1, 1882, to April 30, 1884, was introduced subject to the objection and exception of the defendant. There was evidence tending to show that the entire rent reserved in the lease last mentioned was not paid, and that the tenants who occupied the store at the time of the execution of the lease to the plaintiff continued to occupy it till May 1, 1880, and paid rent to the defendant.

It was not claimed by the defendant that the plaintiff ever consented to the leasing of the store to Hall and Campbell, or that the defendant ever accounted to the plaintiff for any part of the money received by him from Hall and Campbell. The leases to Hall and Campbell were substantially the same in form as the lease from the defendant to the plaintiff.

The defendant requested the judge to rule that the plaintiff was not entitled to recover anything; that there was no eviction, and the plaintiff was not entitled to a verdict on the second count; that if the plaintiff did not enter upon the premises, and did not intend to enter thereon or occupy the same under his lease, he cannot maintain the action upon the second count; that if the plaintiff did not enter upon the premises, and did not intend to enter thereon or occupy the same under the lease, he is not entitled to more than nominal damages, if anything, under the second count; that if the plaintiff did not enter upon the premises, he cannot maintain the action upon the second count; that if the plaintiff is entitled to more than nominal damages under the second count, and if the jury find an eviction by the defendant, the plaintiff can recover no more than the difference between the rent which he agreed to pay under the lease and the actual value of the leasehold estate at the time of the eviction; that if the jury find an eviction by the defendant, and if the plaintiff is entitled to more than nominal damages, he can recover no more than the difference between the amount which he agreed to pay under the lease and the value of the estate which he acquired under the lease at the time of the eviction;

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that if the jury find that there was an eviction of the plaintiff, and that he is entitled to recover under the second count, he is not entitled to a verdict upon the first count; that if there was a breach of the covenants of the plaintiff, the defendant had a right to enter upon the premises and take possession thereof, and the plaintiff is not entitled to any damages therefor; that if the plaintiff was not disturbed in his possession, there was no eviction, and if he never entered under the lease, or intended so to do, there was no eviction; and that if the plaintiff did not quit the leased premises in consequence of the acts of the defendant, he is not entitled to recover for an eviction.

It was agreed that if the plaintiff was only entitled to recover on the first count, judgment should be entered for the sum of $3,122.20, with interest from the first day of March, 1881. The case was therefore submitted to the jury on the second count.

The judge ruled that there was an implied covenant for quiet enjoyment in the lease, and if the defendant, by reason of the leases and conveyance of said premises, intentionally put it out of his power to deliver possession of the leased premises to the plaintiff, the defendant was liable to the plaintiff, on the implied covenant for quiet enjoyment, for the loss of his bargain, and instructed the jury that the rule of damages for the first year of the lease was the proportionate part of the rent reserved in the lease for one year (five thousand dollars) for the time between May 12, 1880, and April 30, 1881, to which sum should be added such sum as the jury should find the rental value of the leased premises to be, for the time from May 12, 1880, to April 30, 1883, over the amount of rent reserved in the lease.

No exceptions were taken to the instructions of the court except such as are implied by the refusal to instruct the jury as requested by the defendant.

The jury found for the plaintiff, and assessed the damages in the sum of nine thousand four hundred and forty-five dollars and twenty-two cents.

If the plaintiff was not entitled to recover, judgment was to be entered for the defendant. If the plaintiff was only entitled to recover on the first count, judgment was to be entered for the plaintiff for the sum of $3,122.20, with interest from March 1, 1881. If the plaintiff was entitled to recover on the second

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count any greater sum than $3,122.20, and interest as aforesaid, and there was no error in the exclusion of evidence, or in the refusal to rule as requested by the defendant, or in the instructions to the jury excepted to, then judgment was to be entered upon the verdict. If there was error in said rulings and refusal to rule, the Supreme Judicial Court should make such order as law and justice might require.

W. F. Slocum & W. S. Slocum, for the defendant.

G. L. Mayberry, (*H. N. Allin* with him,) for the plaintiff.

ALLEN, J. From the facts stated, it would seem probable that Riley, the present plaintiff, might have maintained a defence to the original action of Hale against him, at least as to a part of the rent therein demanded, on the ground that Hale, the lessor, had accepted a surrender or renunciation of the lease. *Talbot* v. *Whipple*, 14 Allen, 177. *Daniels* v. *Newton*, 114 Mass. 530. *Amory* v. *Kannoffsky*, 117 Mass. 351. *Deane* v. *Caldwell*, 127 Mass. 242. But he did not interpose this defence in season to make it effectual, and, having been defaulted, judgment against him for one full year's rent under the lease was taken by Hale; and Riley's subsequent efforts to avoid this judgment were unavailing. Hale thus insisted upon the validity of the lease for the purpose of enforcing the covenant for rent therein contained; but now he seeks to treat it as invalid, for the purpose of avoiding the implied covenant on his part for quiet enjoyment. This he cannot be allowed to do. He cannot treat the lease as valid for the purpose of securing one advantage, and then turn round and treat it as invalid for the purpose of securing a further advantage. *Bradley* v. *Brigham*, 149 Mass. 141, and cases there cited. *Ormsby* v. *Dearborn*, 116 Mass. 386.

It is now contended in behalf of Hale, that he had a right to relet the premises for the account of Riley, and hold Riley responsible for the loss in rent. It is a sufficient answer to this argument to say, that if he had such right he did not exercise it. He let the premises on his own account, and did not account to Riley for the rents received by him, but took judgment against Riley for a year's rent without credit or deduction.

Having thus made a decisive election to treat the lease as existing during that period, he must now stand to the consequences of such election. If Riley was bound as tenant for the

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rent, Hale was bound as lessor on the implied covenant for quiet enjoyment; and Riley is not debarred from seeking damages for a breach of that covenant, by his failure to plead it in defence of the former action. A defence by way of recoupment is a privilege, not a duty. Riley was at liberty to resort to a cross action. *Hunt* v. *Brown*, 146 Mass. 253, 255, 256. *Fiske* v. *Steele*, 152 Mass. 260.

Assuming, then, that the relation of landlord and tenant existed between the parties, Hale was liable on his implied covenant for quiet enjoyment if he intentionally put it out of his power to deliver possession of the premises to Riley without Riley's consent. *Berrington* v. *Casey*, 78 Ill. 317. *Upton* v. *Townend*, 17 C. B. 30, 68, 71. *Hall* v. *Burgess*, 5 B. & C. 332. This was an act of the same nature as putting out a tenant who had taken possession.

The rule of damages as given was correct. If no rent had been paid, the measure of damages would have been the difference between the agreed rental and the actual value. But where a lessee has been excluded from possession, and nevertheless has been compelled to pay rent during the period of such exclusion, the amount so paid is to be added; otherwise his actual loss by reason of the breach of the implied covenant will not be made good. Taylor's Land. & Ten. (8th ed.) § 317. The contention in behalf of the defendant, that the plaintiff is only entitled in any event to nominal damages, rests on the assumption that the plaintiff voluntarily remained out of possession, though aware that the defendant would claim rent. But that assumption is unfounded, and it was not included in any of the defendant's requests for instructions.

For the purpose of proving the actual value of the term covered by his lease, the plaintiff put in evidence, without objection, the leases executed by the defendant to other tenants for the period from May 12, 1880, to April 30, 1881, and also from May 1, 1881, to April 30, 1882, showing the rents agreed to be paid for those periods; and he was allowed to introduce under objection a lease made by Hale's grantee to the same tenants for the period from May 1, 1882, to April 30, 1884, showing the rent agreed to be paid for that period. There was evidence, however, tending to show that the entire rent reserved in the

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last mentioned lease was not paid. The ground of objection taken at the trial to the last lease is not stated, but the only grounds of legal distinction between that and the other leases now urged are, that the defendant was not a party to it, that there was evidence tending to show that the entire rent reserved was not paid, and that it covered a period one year later than the term of the lease to the plaintiff, there being a gradual advance in the rents. The purpose being merely to show the rental value of the premises for the plaintiff's term, the first ground of distinction was immaterial; the second did not affect the competency of the evidence, but was only a matter for comment to the jury; and in respect to the third, it is now to be assumed that, as the lease was admitted merely for the purpose of showing the rental value till April 30, 1883, proper instructions excluding from consideration the later period were given, if asked for. The rentals were admitted, no doubt, not as conclusive tests, but only as evidence of the value of the plaintiff's term, and an objection resting on the ground that the last lease covered too long a period should be expressly stated at the trial, in order to be available by way of exception.

Exceptions overruled.

ANNIE M. BROWNE *vs.* NEW YORK & NEW ENGLAND RAILROAD COMPANY.

Norfolk. December 1, 2, 1892. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Employers' Liability Act.

In an action against a railroad company for personal injuries, it appeared in evidence that the switchman had been sent to throw the switch as a flying switch was to be made; that the engine, with its head facing the cars, was backing and pulling the train along towards the switch; that it had slackened its speed, to let the brakeman pull out the pin and thus to uncouple the caboose car from the engine; that he had hold of the chain attached to the pin, but did not succeed in pulling it out, yet gave the signal for the engineer to start along; that the engineer started faster; that as soon as the engine passed the switch the switchman, without seeing that the caboose car was still coupled to it, threw the switch; and that the coupling held, the caboose car was pulled off the track and

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tipped over, and the brakeman was killed. The pin and the hole in the "stiff-shackle" through which the pin dropped were in good condition, and the reason why the brakeman could not pull it out was that the engine was pulling the train and he did not succeed in getting it out at the moment when the engine slackened its speed. *Held*, that the giving of the signal for the engineer to start faster before the pin was pulled out contributed directly to the accident, and that the plaintiff, who was the brakeman's next of kin dependent, having failed to show that his acts did not contribute to the accident, could not recover under St. 1887, c. 270.

TORT by the plaintiff, as the next of kin dependent, to recover for the death of her son, William D. Browne, under the St. of 1887, c. 270. Trial in the Superior Court, before *Maynard*, J., who directed a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

G. W. Anderson, for the plaintiff.

F. A. Farnham, for the defendant.

ALLEN, J. The accident occurred in this way. A flying switch was to be made. The switchman had been sent to throw the switch. The engine, with its head facing the cars, was backing and pulling the train along towards the switch. It had slackened its speed to enable Browne to pull out the pin and thus to uncouple the caboose car from the engine. He had hold of the chain attached to the pin, but he did not succeed in pulling it out, yet gave the signal for the engineer to start along. The engineer started faster; as soon as the engine got past the switch, the switchman without seeing that the caboose car was still coupled to it threw the switch; the coupling held, the caboose car was pulled off the track, and tipped over; some of the men jumped from it; whether Browne jumped or not is uncertain; at any rate, he was killed. The pin and the hole in the "stiff-shackle" through which it dropped were in good condition. The reason why Browne could not pull it out was that the engine was pulling the train, and he did not succeed in getting it out at the moment when the engine slackened its speed.

The giving of the signal for the engineer to start faster, before the pin was pulled out, contributed directly to the accident. It implied that the car was uncoupled. Had this signal not been given, no accident would have occurred. The engineer would not have started up his engine, but would probably have stopped and pushed the cars back again, and made a new

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attempt. After this signal, everybody else had a right to assume that the car had been uncoupled. This seems to be the most probable explanation of the accident. At any rate, the plaintiff did not show that Browne's acts did not contribute to it. *Exceptions overruled.*

DORA J. IRWIN *vs.* JOHN S. ALLEY & others.

Middlesex. January 10, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Employers' Liability Act — Loss of Life — Due Care — Burden of Proof.

If, in an action brought under the St. of 1887, c. 270, for causing the death of an employee, the evidence introduced is of such a nature that the questions how the accident happened and whether the deceased was using due care can be answered only by conjecture, the action cannot be maintained.

TORT, by the widow of William J. Irwin, under the St. of 1887, c. 270, and the amendment thereof, for causing his death on November 24, 1890.

At the trial in the Superior Court, before *Braley*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

J. Lowell, Jr., (*S. H. Smith* with him,) for the defendants.

W. H. Atwood, for the plaintiff.

HOLMES, J. This is an action brought to recover compensation for the death of the plaintiff's husband. St. 1887, c. 270. The plaintiff has had a verdict, and the question for us is whether there was any evidence sufficient to warrant it. The plaintiff was killed in a leach and cooler building attached to the defendants' tan-yard, in which he had worked from one to two years. In this building was an opening, three feet square, looking down into the tan-yard. In the bottom of the opening was a low trough leaving fifteen inches free. Above this opening, forty-six inches from the floor, was a long revolving shaft. The lengths of shafting were coupled together at their ends by iron flanged couplings bolted together by bolts and nuts, the bolts

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running through the face of the couplings and parallel to the shaft. One of these couplings was over the west side of the opening, and one of the bolts projected from a quarter to a half inch beyond the safety flange, so that manifestly any one coming in contact with it while the shaft was revolving would be in great danger of being caught and whirled round. The plaintiff's husband was caught in this way, and killed. He first was seen as he was dropping from the shaft, most of his clothes having been torn off from him and wrapped around the shaft. The only occasions which the deceased had to come near the coupling was to oil the machinery, and to communicate with the men in the yard. He was not doing the former, as his oil can was found in its place. It does not appear that he was doing or attempting to do the latter, and, so far as the evidence goes, it tends to show that he had no occasion to do so. This is the plaintiff's case, and in view of the manifest dangers of a revolving shaft, whether the deceased knew of the projecting bolt or not, (*Russell* v. *Tillotson*, 140 Mass. 201,) and in view of the absence of any known occasion for the deceased to be near it, we are of opinion that the questions how the accident happened and whether the deceased was using due care can be answered only by conjecture. This is enough to dispose of the case without going further. *Shea* v. *Boston & Maine Railroad*, 154 Mass. 31. *Exceptions sustained.*

JOSEPH F. WILSON *vs.* FREDERICK A. HAWLEY & others.

Suffolk. January 11, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Note — Pledge — Collateral Security — Disposition of Security by Pledgee — Discharge in Insolvency — Bar.

A. borrowed a certain sum of B., a broker, giving him a promissory note therefor and assigning to him as collateral security certain shares of stock. The note provided that the holder of the stock "has authority to sell, transfer, or hypothecate said collateral for his own use." The note was renewed from time to time, and A. finally paid it, upon B.'s representation that he had the certificate of the stock in his possession and his promise to send it to A., which he did not do,

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but on that day he failed in business, and made an assignment. In fact, B. without A.'s knowledge pledged the stock for his own purposes on the day when he received it from A., and it was sold by the pledgee after B.'s assignment. B. filed his petition in insolvency, and received his discharge; and A. proved his claim, and received his dividend. *Held*, in an action by A. against B to recover the amount so paid by the former, that the disposition of the stock by B. was not fraudulent, within the meaning of the Pub. Sts. c. 157, § 84, or of the St. of 1885, c. 353, § 6; and that the action was barred by the discharge in insolvency.

CONTRACT for money had and received, with a count in tort for the conversion of certain shares of stock. Answer: 1. A general denial. 2. A discharge in insolvency. Trial in the Superior Court, without a jury, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that the defendants, constituting the firm of F. A. Hawley and Company, formerly bankers and stock-brokers in Boston, failed in May, 1884. The plaintiff had a small deposit with them in January, 1884, and prior thereto, and also at the time of the failure, for which he held a deposit-book. On January 10, 1884, he borrowed of the defendants the sum of $500, and gave them therefor his promissory note, and assigned to them the stock specified in the note, which was as follows:

"$500. Boston, Jan. 10, 1884. Thirty days after date I promise to pay to F. A. Hawley & Co. or order five hundred dollars, for value received, with interest at the rate of $5 per month after date, having deposited as collateral security therefor (5 sh's) five shares Bell Telephone stock. And the undersigned further promises, contracts, and agrees as follows, namely: First, that the margin on this collateral shall be kept good at fifty dollars above the market price. Second, that this collateral shall be held as security for all debts, either due or owing to the holder hereof, either at the time of settlement or when the collateral is sold and applied as agreed below. Third, that the holder of said collateral has authority to sell, transfer, or hypothecate said collateral for his own use. Fourth, the holder hereof being required, on payment or tender of the amount due hereon, together with all other sums due or owing the holder hereof, at any time before said collateral shall have been sold or applied, to return a like amount, but is not required to return the specific collateral herewith de-

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posited. Fifth, that the holder hereof has authority, upon the non-performance of any of the above promises, contracts, or agreements, to sell without notice said collateral at any brokers' board, at public or private sale, or to purchase it on his own account, at its fair market value, and apply it on account."

The note was renewed from time to time, as appears by the indorsements thereon.

On May 13, 1884, F. A. Hawley, the senior member of the firm, went to the plaintiff's office, taking the note with him, upon which he had written an indorsement of interest for a further extension to June, 1884, and asked the plaintiff if he did not wish to extend the payment again. The plaintiff replied that he did not, but wished to pay it, and asked Hawley if he had the certificate of stock with him. Hawley replied that he had not, that it was at his office, and that he would send it to him immediately. Thereupon the plaintiff drew his check for $500, payable to the defendant's order, and delivered it to Hawley. On the same day, the plaintiff, not receiving his stock, went to the defendants' banking-rooms for it. He was then asked whether he would have the stock reassigned in his own name or in blank, and he replied that he would have it in his own name. He was then told that the certificate was at the Howard National Bank, and that it would take two or three days for the delivery, and he went away satisfied.

The check was deposited on the day of its date by the defendants, and paid in due course. On May 15, 1884, not having received the stock, the plaintiff went again to the defendants' banking-house for it, when he learned that the defendants had failed, and that he must look to their attorney for information. The defendants failed on May 15, and on the same day made an assignment to one Mandell, conveying to him all their assets. The assignee testified that he received no Bell Telephone stock, under the assignment or otherwise, from the defendants.

In fact the stock was pledged to the Howard National Bank by the defendants on January 10, 1884, for their own purposes, but without the knowledge of the plaintiff, except so far as the terms of the note were notice; and it was sold by the bank after the assignment, and a report of the sale made to the

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assignee. Demand was made for the stock both upon the defendants and upon their assignee.

The plaintiff had no reason to suppose, except so far as the note was notice that it might be done, that the stock had been disposed of until after he had paid and taken up the note, and then was only told that it was at the Howard National Bank. The defendants filed their petition in insolvency on June 4, 1884, and offered a composition of fifteen per cent, which was confirmed. The plaintiff proved his claim and received his dividend.

The plaintiff contended that the money for payment of the note was obtained from him by fraud and deceit; that the disposition of the collateral security was unauthorized and fraudulent in law; and that neither claim nor cause of action was barred by the discharge; and asked the judge so to rule. But the judge found as a fact that the money was not obtained by deceit, and ruled, as matter of law, that the defendants had a right, under the terms of the note, to dispose of the collateral security as they did; that such disposition was not fraudulent, within the meaning of the Pub. Sts. c. 157, § 84, and the St. of 1855, c. 353, § 6; and that the plaintiff's claims were barred by the discharge in insolvency; and found for the defendants. The plaintiff alleged exceptions.

E. Avery, (*G. M. Hobbs* with him,) for the defendants.

J. O. Teele, for the plaintiff.

BARKER, J. In pledging for their own debt the shares of stock pledged to them by the plaintiff, the defendants acted within the authority given by that clause of the contract which stated that the holder of the collateral had authority to sell, transfer, or hypothecate it for his own use. Although upon their insolvency the shares were sold by their pledgee, the debt created by their failure to restore them to the plaintiff was not "a debt or claim against a pledgee created by his sale of collateral securities in a manner not authorized by his contract with the pledger." St. 1885, c. 353, § 6. On the contrary, however unwise or extraordinary the plaintiff's contract with the defendants may have been, it distinctly authorized the defendants to deal with the shares in the manner which created the plaintiff's debt. The rulings that the disposition of the shares was not

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fraudulent within the meaning of the Pub. Sts. c. 157, § 84, or of the St. of 1885, c. 353, § 6, and that the plaintiff's claims were barred by the discharge in insolvency, were therefore correct.

Exceptions overruled.

JOHN W. CURRIER *vs.* ALBERT HALLOWELL.

Suffolk. January 11, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Patent — Action.

In October, 1883, B. made the following written agreement: "Received of A." a certain sum "in full payment for all filters and water-cocks made to date, it being understood A. shall own one undivided half of any patent and improvements that may be made on said filters; also" a certain sum "for which I am to assign one undivided half of loom-check patent, which is already allowed." To this was added an oral agreement that, if A. would furnish the money necessary for improving and perfecting the filters and water-cocks mentioned and for manufacturing them for sale, B. would do the work necessary to perfect and develop the invention for the benefit of A. and B. jointly, do the business of manufacturing and selling the filters and water-cocks, and would pay A. one half of the net proceeds of the sale. Under this agreement, in 1883 and 1884, A. laid out several hundred dollars "for perfecting hydraulic filtering faucet, and for manufacturing filters and water-cocks." In the summer of 1884, B. got a patent on the water-cock and filter combined in one patent. Later in the same year, B. sold the patent and all the water-cocks he then had for several thousand dollars, and fraudulently concealed the fact until within six years of the date of an action by A. against B. to recover A.'s share of that sum. *Held*, that an action for a share of the proceeds could be maintained.

HOLMES, J. This is an action to recover a share of the proceeds of certain patents and patented articles. The defences are a general denial and the statute of limitations. The case was tried before a judge, without a jury, and comes before us on exceptions to the refusal of the court to rule that the plaintiff could not maintain his action, and also that the relation between the parties was a partnership, and that the plaintiff could only recover a share in the profits after deducting all expenses and charges.

At the trial an auditor's report was put in, and although there was other evidence the court found that it did not control the

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auditor's report; therefore, so far as necessary to sustain the rulings, we have assumed that the judge disbelieved the additional evidence. The material facts are as follows. On October 23, 1883, the defendant made the following written agreement: "Lowell, Mass., October 23, 1883. Received of J. W. Currier two hundred and twenty-eight dollars and eighty-four cents, in full payment for all filters and water-cocks made to date, it being understood J. W. Currier shall own one undivided half of any patent and improvements that may be made on said filters; also eighty-two dollars, for which I am to assign one undivided half of loom-check patent, which is already allowed." To this was added an oral agreement that, if the plaintiff would furnish the money necessary for improving and perfecting the filters and water-cocks mentioned and for manufacturing them for sale, the defendant would do the work necessary to perfect and develop the invention for the benefit of the plaintiff and defendant jointly, do the business of manufacturing and selling the filters and water-cocks, and would pay the plaintiff one half of the net proceeds of the sale. Under this agreement, in 1883 and 1884, the plaintiff laid out between six and seven hundred dollars "for perfecting hydraulic filtering faucet, and for manufacturing filters and water-cocks." In the summer of 1884 the defendant got a patent on the water-cock and filter combined in one patent. Later in the same year, the defendant sold the patent and all the water-cocks he then had for five thousand dollars, and fraudulently concealed the fact until within six years of the date of this action, which is brought for the plaintiff's share in that sum.

It is objected that the patent was not for the filter alone, and that the agreement did not extend to a patent for a filter and water-cock combined. But the facts reported warrant the inference that the invention spoken of included a combination of filter and water-cock, and were it otherwise it would be hard to see how the defendant could benefit by a confusion introduced by himself, it being clear that the filter at least was within the scope of the contract. See *Ryder* v. *Hathaway*, 21 Pick. 298, 305, 306; *Lupton* v. *White*, 15 Ves. 432, 442.

As the agreement applied to the patent, the effect of the dealings was to give the plaintiff at least an equitable interest

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in the invention. It is found that, at the date of the agreement, the invention was so far perfected as to be capable of assignment; but were this otherwise, as the agreement gave the marks by which the invention and patent contemplated could be ascertained when they came into being, it would have operated upon them at that time. See *Gayler* v. *Wilder*, 10 How. 477; *Railroad Co.* v. *Trimble*, 10 Wall. 367; *Smith* v. *Edwards*, 156 Mass. 221, 222.

The plaintiff, being entitled to one half of the patent, was entitled to one half of the money received by the defendant as its proceeds, and it is quite immaterial whether the plaintiff's right was equitable or legal. The quasi equitable right to treat such money as received to the plaintiff's use is as strong in the one case as in the other. An action lies by one co-owner against the other in circumstances like the present, and even if there was a partnership (*Somerby* v. *Buntin*, 118 Mass. 279) the venture was ended, and nothing remained but to divide the money; it has been settled in this State for a long time that an action at law is a proper remedy when there are only two partners. *Jones* v. *Harraden*, 9 Mass. 540, n. *Bond* v. *Hays*, 12 Mass. 34, 36. *Stiles* v. *Campbell*, 11 Mass. 321. *Shepard* v. *Richards*, 2 Gray, 424, 426, 427. *Blood* v. *Blood*, 110 Mass. 545, 547.

The sale of the patent was wholly outside of and contrary to the agreement of the parties. That of the cocks, on the other hand, was contemplated, and the defendant was only to pay over one half the net proceeds of the sale. Therefore, as to the latter, if it had appeared that they furnished an appreciable part of the consideration for the money received by the defendant, and that the defendant had been at expense in producing them, a case can be imagined in which it would have been proper to deduct such expenses in whole or in part. But the auditor's report discloses no outlay by the defendant, and although the defendant testified to payments which may have included among their undiscriminated items some on account of the filters, there was other testimony that the plaintiff made all the payments, and it is probable that he made more than half. We must assume that the judge's view of the material facts was not affected by the defendant's testimony. It is not necessary to say more to an-

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swer the suggestions which may be drawn from *Somerby* v. *Buntin*, 118 Mass. 279, 286, that the patent was part of the supposed partnership assets, a question on which we express no opinion.

The defence of the statute of limitations was not argued to us. It was disposed of by the finding that the defendant fraudulently concealed the cause of action up to 1889. Pub. Sts. c. 197, § 14. All but one thousand dollars was received within six years. *Miller* v. *Miller*, 7 Pick. 133.

Exceptions overruled.

E. M. Johnson, (*W. N. Osgood* with him), for the defendant.

J. C. Burke, for the plaintiff.

NELLIE A. POWERS, administratrix, *vs.* BOSTON GAS LIGHT COMPANY.

Suffolk. January 11, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Gas Company — Evidence.

In an action against a gas company for personal injuries occasioned by its alleged negligence in the conduct of its business, a printed notice issued by it to gas consumers, calling attention to the liability of leaks from the digging up of the streets by various corporations, and requesting compliance with certain rules, and which was distributed by its agents within a year before the accident, is admissible in evidence.

TORT, for personal injuries occasioned to the plaintiff's intestate, Peter F. Lydon, by the alleged negligence of the defendant. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows.

Lydon was fatally injured on the evening of December 26, 1888, by an explosion of gas in a manhole belonging to the Boston Steam Heating Company, located at the corner of Oliver Street and Fort Hill Square in Boston.

There was evidence tending to show that Lydon was assisting one Powers, who was in the employ of the Boston Steam Heating Company, in inspecting the manhole in question, which

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was about eighteen feet deep, through which passed certain steam-pipes; that Lydon descended into the manhole with a lighted lantern for the purpose of cleaning the same out, and when he had proceeded into the same about four feet with his lantern the explosion occurred which caused the injury; that the defendant had a gas main located about eight or ten feet from the manhole, which, on December 16, 1888, was found to have been broken nearly in two pieces, and the same was on that day repaired by the defendant by putting a clamp about twenty-four inches long over the broken pipe or main, with a layer of cement and oakum between; that the clamp was composed of cast iron, and worked with a hinge upon one side, and on the other side were certain bolts which ran through the clamp, and were made fast at that side; and that a short time after the explosion, the clamp and part of the pipe which it covered were taken out, and the clamp was found to be broken, and there was a crack large enough to put in a knife-blade running the whole length.

There was no evidence tending to show when the clamp broke; but it was contended by the plaintiff that the pipe was not repaired properly, and that the clamp was broken by causes which could have been foreseen by the defendant. The defendant introduced evidence tending to show that the pipe was broken by reason of the settling of the streets, caused by work done some time before by the Boston Steam Heating Company in digging up the streets; and that the clamp was either broken by the same cause, or by the force of the explosion. The plaintiff introduced evidence tending to show that the clamp was broken by contraction; that the pipe and clamp were not sufficient to hold the gas; that it leaked, and found its way into the manhole, and caused the explosion; and that this was due to the negligence of the defendant.

The defendant further introduced, in order to show the system and manner in which it carried on business, evidence that it had in the streets of Boston gas pipes measuring about two hundred and fifty miles; that the laying and repairing of these pipes was managed by the street department, of which one Durrell was superintendent at the time of the accident; that the assistant superintendent was always at the office of the

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defendant at night; that it had also in its employ a body of men called jobbers, whose business it was to attend to all complaints and notices of leaks, and to repair small leaks in houses; that several of them were stationed night and day at the office for the purpose of receiving such notices; that it had a clerk whose duty it was to receive all such complaints and notices of leaks, and transmit them at once to the proper persons to repair them; that it also had men whose duty it was to collect bills from its customers, and others to connect the service pipes with the mains in the street; that it had in the mains in the streets several thousand valves, so arranged that the gas could be cut off from the pipes within a few minutes from the arrival of the men on the spot; and that it had, in 1888, some seven or eight hundred men in its employ. For the purpose of showing due care on the part of the defendant in the general management of its business, and as a part of its sytem, it was allowed to introduce the following notice, as evidence thereof:

"Notice to Gas Consumers. — Important. — The gas-pipes in the streets are liable to be broken by the settlement of the streets after any disturbance of the soil, and in cases of leaks of gas from the street pipes an examination of the burners in the building will not disclose the cause or locality of the leak. As is well known, many of the streets of this city have recently been dug up by the Telephone Company, Electric Light Company, Steam Heating Company, and Bay State Gas Company. The Boston Gas Light Company hereby calls your attention to this fact, and, in order to prevent accidents from explosions or inhalation of its gas, requests your strict compliance with the following rules: 1. As soon as a smell of gas is perceived, either by day or night, immediate notice should be sent to the office of the company, No. 24 West Street; 2. No light should be taken into any room where there is a smell of gas, and no match should be lighted; 3. The windows in any room where gas is perceived should be opened at once, and kept open. The attention of all your employees should be called to these rules at once, and a careful compliance with them should be enforced."

The notice was signed by the defendant, and dated December 1, 1887. The plaintiff excepted to the admission of this notice.

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It appeared in evidence that notices similar to the one introduced in evidence were delivered along the route where the accident happened, by collectors of the defendant, some time after December, 1887, and prior to the explosion. The collectors of the defendant testified that they delivered to all their customers along the route such notices; and there was no evidence whether the Boston Steam Heating Company was or was not a customer, except that its office was on the route. There was no evidence offered tending to show whether the notice did or did not come to the knowledge of Lydon.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. H. Baker, for the plaintiff.

C. P. Greenough, (*J. P. Parmenter* with him,) for the defendant.

BARKER, J. The defendant's negligence in failing to discover that gas was escaping from its pipes, in the immediate vicinity of the manhole where the plaintiff's intestate was injured by an explosion, is alleged as one of the grounds of the action, and there are also counts for the defendant's negligence in not furnishing proper and safe pipes, and in not properly inspecting and repairing them. The issue whether the defendant was negligent in the conduct of its business was thus raised, and upon this issue a wide range of evidence was relevant and material. This results from the nature and extent of the business which the Legislature has authorized the defendant to transact. The supply of gas to a city like Boston requires the maintenance of many miles of street mains, at any point of which a leak is liable to occur. Practically it is no more possible for a gas company to so arrange its mains, or to have such a force of servants, that all leaks shall be discovered as soon as they occur, than for a city or town constantly to keep all of its highways in perfect repair. In both cases it is well settled that evidence of what precautions were actually taken, and of what means were actually employed to discharge the duties imposed, is relevant and admissible. *Holly* v. *Boston Gas Light Co.* 8 Gray, 123. *Hunt* v. *Lowell Gas Light Co.* 1 Allen, 343. *Emerson* v. *Lowell Gas Light Co.* 3 Allen, 410. *Bartlett* v. *Boston Gas Light Co.* 117 Mass. 533. *Rooney* v. *Ran-*

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dolph, 128 Mass. 580. *Hayes* v. *Cambridge*, 136 Mass. 402, and 138 Mass. 461.

The question whether the defendant was at fault is one to be determined upon a view of its system and manner of doing business, so far as that is relevant to the alleged negligence. The notice issued by the defendant to gas consumers, calling attention to the liability of leaks from the digging up of the streets by various corporations, which was distributed by its agents, was relevant, and was near enough in time to be admissible. The objection that the printed notice given in evidence was a copy merely, and was not one of those actually distributed to its customers by the defendant, is not saved in the bill of exceptions. *Exceptions overruled.*

GEORGE R. TURNER, executor, *vs.* BOSTON & MAINE RAILROAD & another.

Suffolk. January 13, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Railroad — Licensee — Unblocked Frog — Negligence — Law and Fact — Evidence.

An employee of a railroad corporation, who is engaged in delivering a car to another railroad corporation upon the latter's tracks in the regular course of business between the two corporations, is not a mere licensee.

If an employee of a railroad corporation is injured by having his foot caught in a frog in the track of another railroad corporation, while engaged in delivering a car to the latter upon its tracks in the regular course of business between the two corporations, it is a question for the jury, in an action against the last named corporation for the injury, whether the defendant was negligent in leaving the frog unblocked, there being evidence that the defendant had assumed the duty of blocking all the frogs, and keeping them blocked, for the safety of its own employees, as required by the St. of 1886, c. 120.

In an action against a railroad corporation for personal injuries occasioned to an employee of another railroad corporation, by having his foot caught in an unblocked frog in the track of the former corporation, while engaged in delivering a car to the latter upon its tracks in the regular course of business between the two corporations, it appeared that the frog was about twenty-eight feet distant from the end of a passenger station at a junction where the roads of the two corporations crossed each other. There was evidence from the section master in charge of the blocking of frogs at this place, from which it might be found that he had not noticed for three or four days whether the frog which

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caused the accident was blocked or not; and other men under him were not called as witnesses upon this point. It was also contended, from the appearance and testimony of the section master, that he was not to be believed when he testified that he had blocked this frog shortly before the accident; and it was further argued that other frogs near by were also left unblocked. *Held*, that it was open to the plaintiff to contend that, if this frog had ever been blocked at all, it had not been in that condition recently before the accident; and if not, that it might be inferred that the defendant or its agents or servants knew or ought to have known the fact.

In an action against a railroad corporation for personal injuries occasioned to an employee of another railroad corporation, by having his foot caught in an unblocked frog in the track of the former corporation, while in the performance of his duties in delivering a car upon its tracks, a photograph taken the next morning after the accident, which occurred in the evening, showing the condition of other frogs near by, having been put in evidence without objection, is competent to be used to show that the other frogs were unblocked, the defendant's section master having testified, in substance, that he kept all the frogs blocked, including the one which caused the accident.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff, resulting in his losing both legs below the knees, a physician testified, without objection, that he had recommended the plaintiff to go South or West for the recovery of his health; that it was necessary that a person should go from here with him; that he was in the incipient stages of consumption; and that, while his injuries would not directly produce this disease, they would produce a condition of body favorable to its development. He was then allowed, against objection, to testify as to the price for the services of such a trained nurse as would be competent to take care of the plaintiff. *Held*, that the defendant had no ground of exception.

TORT, against the Boston and Maine Railroad and the Fitchburg Railroad Company, for personal injuries occasioned to the plaintiff's testator, Frank H. Turner, while in the discharge of his duties as a brakeman in the employ of the Fitchburg Railroad Company, by having his foot caught in a frog in the tracks of the Boston and Maine Railroad. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict for the Fitchburg Railroad Company, and for the plaintiff as against the Boston and Maine Railroad; and the latter alleged exceptions, which appear in the opinion.

T. Hunt & S. Lincoln, for the defendants.

R. M. Morse, (*C. E. Hellier* with him,) for the plaintiff.

ALLEN, J. 1. The Boston and Maine Railroad contends that there was no evidence to warrant the jury in finding that the plaintiff's testator was rightfully upon its tracks, or, at most, that when there he had any other rights than those of a licensee. This view cannot be sustained. There was evidence tending

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to show that it was customary for the Fitchburg Railroad Company to deliver cars to the Boston and Maine Railroad upon the track in question, in the usual course of business between the two railroad companies, and that, on the occasion of the accident, a car had been so delivered, but was not pushed quite far enough upon it. It was proper for the Fitchburg Railroad Company to deliver the car in a suitable place on the track, even if it was not its duty to do so, and in doing so that company and its servants, of whom the plaintiff's testator was one, could not be considered as bare licensees. They were engaged in making a proper delivery of the car in the regular course of the business of the two railroad companies, and the rules of law applicable to mere licensees do not apply to the plaintiff's testator. *Plummer* v. *Dill*, 156 Mass. 426. *Sawyer* v. *Rutland & Burlington Railroad*, 27 Vt. 370. *Merrill* v. *Montpelier & Wells River Railroad*, 54 Vt. 200. *Smith* v. *New York & Harlem Railroad*, 19 N. Y. 127.

2. The Boston and Maine Railroad further contends that there was no evidence of negligence on its part. It was not in dispute that the frog was unblocked at the time of the accident. It was also in evidence that the Boston and Maine Railroad had assumed the duty of blocking all the frogs and keeping them blocked, for the safety of its own employees. The Boston and Maine Railroad contended that it owed no duty at all to the plaintiff in respect to the frog, and that he had no right to be on the track, either growing out of the customary mode of doing business or otherwise. This view, as already said, cannot avail, because the plaintiff's testator did not stand as a bare licensee. He therefore had a right to expect that some precaution for his safety should be taken. If the Boston and Maine Railroad owed any duty at all to the plaintiff in this respect, no request was made to have the measure of this duty defined, and no exception was taken to the instructions which were given in respect to it. We do not, however, see that the instructions which were given imposed too heavy a duty upon the Boston and Maine Railroad. For the safety of its own employees, at least, by St. 1886, c. 120, § 1, it was made the duty of that road to "fill or block the frogs, switches, and guard rails on its track, with the exception of guard rails

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on bridges, so as to prevent the feet of its employees from being caught therein." If leaving frogs unblocked was dangerous to employees of the Boston and Maine Railroad, it might be inferred that it was not safe for the plaintiff's testator. Courts may take notice of the standard of safety in respect to frogs which the Legislature has fixed. This statute, we are told by counsel in argument, was not before the jury, so that at the trial the Boston and Maine Railroad had the benefit of its exclusion. But in view of this statute, leaving the frog unblocked might be attended with danger to the plaintiff, and might therefore have some tendency to show negligence on the part of the Boston and Maine Railroad; and the cases cited from other jurisdictions, where it has been held that leaving frogs unblocked is no evidence of negligence, are not applicable here. Whether leaving a frog unblocked was or was not negligence was left to the jury, and the Boston and Maine Railroad had no right to a ruling, as matter of law, that it was not negligence.

3. The Boston and Maine Railroad further contends that there was no evidence that it, or its agents or servants, knew or ought to have known that the frog was unblocked. The facts relied on by the plaintiff in opposition to this view are as follows. The frog was about twenty-eight feet distant from the southerly end of the passenger station at Ayer Junction, where the main line of the Fitchburg Railroad is crossed by the Worcester and Nashua division of the Boston and Maine Railroad. There was evidence from the section master in charge of the blocking of frogs at this place, from which it might be argued and found by the jury that he had not noticed for three or four days whether this frog was blocked or not. Other men under him were not called as witnesses upon this point. It was also contended at the trial, from the appearance and testimony of the section master, that he was not to be believed when he testified that he had blocked this frog shortly before the accident; and it was further argued that other frogs near by were also left unblocked. It was open to the plaintiff to contend that, if this frog had ever been blocked at all, it had not been in that condition recently before the accident; and if not, that it might be inferred that the railroad or its agents or servants, knew or ought to have known the fact.

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We do not find it stated that any distinct claim was made by the plaintiff on the ground that the Boston and Maine Railroad had failed to employ a suitable person to attend to the blocking of the frogs. If that point was in issue, it was proper for the jury. *Gilman* v. *Eastern Railroad*, 13 Allen, 433, 442, 443. *Keith* v. *New Haven & Northampton Co.* 140 Mass. 175. *Coffee* v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21.

4. There was no error in permitting the plaintiff's counsel to use the photograph for the purpose of showing the condition of other frogs near by, and of arguing from it that they also were unblocked. The accident to the plaintiff's testator happened in the evening. The photograph was taken the next morning, for the use of the Fitchburg Railroad Company, the co-defendant in the writ. It had been put in evidence generally, without objection. The first use made of it was in the cross-examination of one of the plaintiff's witnesses, who was asked to point out the place where Turner caught his foot, and he did so; and he was asked whether the photograph showed any frog on the other side of the car. While the section master was under cross-examination, the photograph was again used, and was put in evidence, and the attention of the jury was called to the position of the frogs at which the accident occurred. He was afterwards asked if he saw any indication of blocks at another point, but this question, being objected to, was waived. That is, as we understand it, the plaintiff's counsel did not care to press the question to the witness as to what he saw on the photograph. What the photograph showed could be seen by others, as well as by the witness. We do not understand that there was a waiver of a right to use the photograph for the purpose of showing that other frogs were unblocked; and the presiding justice could not so have understood, since he permitted it to be used for that purpose in the argument.

This use of the photograph was competent. It was taken just after the accident. There was no suggestion that there had been any change in the condition of the frogs in the mean while. No verification of the photograph had been required when it was put in evidence; indeed, it was first used either by the Boston and Maine Railroad or by its co-defendant, and it therefore stands as if it had been verified by the oath of the photographer. The section master had testified, amongst other

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things, in chief, that prior to the accident he had received orders to block all the frogs and keep them blocked; that he had blocked this particular frog about a week before the accident; and that the Boston and Maine Railroad had supplied blocks to him; and, on cross-examination, that he did not keep any account as to when he put blocks into frogs, that he put them in when needed, and that he was looking all the time for them. The jury might well understand this testimony to mean that he kept all the frogs blocked, as well as this particular frog. To meet this the plaintiff might show, by any competent evidence, that on the morning after the accident other frogs near by were unblocked, and might argue, in the absence of anything to show the contrary, that it was unlikely that several blocks would get displaced at once, and that the witness was mistaken in his testimony, and also that the evidence tended to show notice to the Boston and Maine Railroad or its officers. The photograph was competent evidence for the purpose of showing that the blocks were not there. *Blair* v. *Pelham*, 118 Mass. 420. *Randall* v. *Chase*, 133 Mass. 210. *Dyson* v. *New York & New England Railroad*, 57 Conn. 9, 24.

5. The remaining question is as to the admissibility of the evidence of the price for the services of a nurse. Dr. Whittier had testified, without objection, that he had recommended the plaintiff's testator to go South or West for the recovery of his health; that it was necessary that a person should go from here with him; that he was in the incipient stages of consumption; and that, while his injuries would not directly produce this disease, they would produce a condition of body favorable to its development. He was then allowed, against objection, to testify that a fair price for the services of such trained nurse as would be competent to take care of such a case would be five dollars a day. The plaintiff's testator had lost by the accident both legs below the knees.

There could be but one action to recover damages for the injury, and therefore compensation for injury in the future, as well as in the past, must now be estimated and awarded. The question before us is not as to the rule to be applied when compensation for the future is to be made, but merely whether the evidence was competent. Elements of injury in the future which may be considered are the probable duration of life or of ill health, the diminished ability to labor, the loss of future

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income, and the increase of future necessary and reasonable expenses. The reasonable cost of employing physicians and nurses, when such assistance has been necessary, is not open to objection. One physician or one nurse may charge more than another, and a jury may have to determine whether actual expenses have been reasonable, or what future expenses may be reasonable. But we see no ground on which a jury can be shut off from considering reasonable expenses incidental to attempts to effect a cure or to lessen the amount of the injury, and this was allowed in *Phillips* v. *Southwestern Railway*, 4 Q. B. D. 406, 408, *Phillips* v. *London & Southwestern Railway*, 5 Q. B. D. 78, 80, and 5 C. P. D. 280, 286, 287, 291, 292, in which cases the expenses of a journey to the South of France, by advice of medical attendants, were included as proper to be considered. Diminished ability to labor in the future may be shown. *Ballou* v. *Farnum*, 11 Allen, 73. *Howes* v. *Ashfield*, 99 Mass. 540. Loss of future income and probable duration of life were held to be proper in *Vicksburg & Meridian Railroad* v. *Putnam*, 118 U. S. 545. See also *Griswold* v. *New York Central & Hudson River Railroad*, 115 N. Y. 61. The increase of future expenses for physicians and nurses must rest upon the same ground. 4 Q. B. D. 408. *Feeney* v. *Long Island Railroad*, 116 N. Y. 375. *Hopkins* v. *Atlantic & St. Lawrence Railroad*, 36 N. H. 9.

It is now to be assumed that all proper instructions as to the measure of damages were given. The evidence was competent. *Exceptions overruled.*

FRANCES A. HILL *vs.* RENTON WHIDDEN.

Suffolk. January 13, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Note — Release — Consideration — Evidence — Action — Bar.

In an action upon a promissory note, by the payee against the maker, it is competent for the plaintiff to prove that the note was given to him as a part of the consideration for an instrument of release executed by him to the defendant, in addition to the consideration mentioned therein.

A promissory note, payable to an executor in his own name, without his official

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designation, may be enforced against the maker, although founded upon a consideration moving from the payee as executor.

A release of all debts, demands, actions, and causes of action existing at its date is not a bar to an action by the releasor upon a promissory note given to him by the releasee as a part of the consideration for the release, and of even date therewith.

CONTRACT upon two promissory notes for $1,000 each, dated July 24, 1889, payable in two years after date to the order of the plaintiff, and signed by the defendant. Answer: 1. A general denial. 2. Payment. 3. A release of the cause of action. Trial in the Superior Court, without a jury, before *Thompson*, J., who allowed a bill of exceptions, in substance as follows.

The defendant contended that there was no legal consideration for the notes in suit; and that, in any event they were released by the following instrument:

"Know all men by these presents, That I, Frances A. Hill, of Boston in the county of Suffolk and Commonwealth of Massachusetts, as executrix of the will of James Hill, late of said Boston, deceased, being hereto authorized by a decree of the Probate Court for said county of Suffolk, dated the twenty-second day of July, 1889, for and in consideration of the sum of $3,000, cash, of notes amounting to $1400, and of a satisfactory bond of indemnity against the debts of the late firm of Whidden, Hill, & Co., to me given by Renton Whidden of said Boston, the receipt of which sum, notes, and bond is hereby acknowledged, do hereby sell, transfer, set over, and assign to the said Renton Whidden and his heirs, executors, administrators, and assigns all my right, title, and interest, as said executrix or otherwise, in and to the property and assets, of whatsoever name and nature, of the late firm of Whidden, Hill, & Co.; and I do hereby, both as said executrix and individually, for myself, my heirs, executors, administrators, and assigns, remise, release, and forever discharge the said late firm of Whidden, Hill, & Co., and the said Renton Whidden as surviving partner thereof, and also the said Renton Whidden personally, and his heirs, executors, and administrators, of and from all debts, demands, actions, causes of action, suits, dues, sum and sums of money, accounts, reckonings, bonds, specialties, covenants, contracts, controversies, agreements, promises, doings, omissions, variances, damages, extents, executions, and liabilities, both in law

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and equity, or which may result from the existing state of things which against the said late firm of Whidden, Hill, & Co., or Renton Whidden as surviving partner thereof, or the said Renton Whidden personally, I, the said Frances A. Hill, as said executrix, or personally, now have or ever had from the beginning of the world to the day of the date of these presents.

"And for the consideration aforesaid, I do also agree that I will settle and discharge the bill of Amos D. Albee for making an examination of the books of said late firm of Whidden, Hill, and Company, and save the said Renton Whidden harmless therefrom.

"In witness whereof I, the said Frances A. Hill, both as said executrix and personally, have hereto set my hand and seal, this twenty-fourth day of July, A. D. 1889.

"Frances A. Hill, Executrix.
Frances A. Hill."

It appeared in evidence that the plaintiff was the widow of James Hill, who had in his lifetime together with the defendant constituted the firm of Whidden, Hill, and Company. Upon the death of Hill, the plaintiff was appointed executrix of his will, and a controversy arose between herself as such executrix and the defendant as surviving partner of the firm in relation to the amount due to the estate of Hill upon a settlement of the firm accounts. In the spring or summer of 1889, terms of settlement were substantially agreed upon, but in arranging the details more or less delay was caused, so that the settlement was not finally carried through until August 23, 1889, although all the papers were dated as of July 24, which was the date when it was anticipated that the settlement would be consummated.

There was no dispute at the trial as to the terms of the settlement, except so far as concerned the two notes sued upon, the terms being in substance as follows. The defendant was to pay to the plaintiff, as executrix, the sum of $3,000 in cash, and to give her fourteen notes of $100 each, and a bond of indemnity against the debts of the firm of Whidden, Hill, and Company; while the plaintiff as executrix was to transfer and assign all her right and interest in the real and personal property and assets of the firm to the defendant, and release the firm and the

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defendant as surviving partner from all claims and demands of whatsoever nature.

On June 24, 1889, the plaintiff filed a petition in the Probate Court for authority, as executrix, to settle the controversy upon the above mentioned terms, and that court, on July 22, 1889, entered the following decree:

"That said petitioner, executrix as aforesaid, be, and she hereby is, authorized to release all claims of said estate against said Whidden on account of said copartnership, and to release to said Whidden and convey any and all interest of said deceased in and to a certain lot or parcel of land, with the buildings thereon, situate and lying between Malden and Wareham Streets in said Boston, and to transfer and assign to said Whidden all of the interest of said estate in and to the assets of said copartnership of every nature and description; all in consideration of the sum of three thousand dollars in cash, promissory notes amounting to fourteen hundred dollars, to be paid her, and the execution of a bond of indemnity by said Whidden, with sureties satisfactory to said petitioner, to pay all liabilities, debts, and claims of every kind against said firm, or which said estate would be liable for on account of said firm."

On August 23, 1889, the parties made and consummated the terms of the settlement above stated; the defendant on that day paying to the plaintiff as executrix the sum of $3,000 in cash, fourteen notes of $100 each, payable at monthly intervals until the whole were paid, and a satisfactory bond of indemnity against the debts of Whidden, Hill, and Company. Of the amount of the notes $400 was to pay a part of the accountant's bill. At the same time the plaintiff, as executrix and individually, executed and delivered the instrument above set forth, and also two deeds conveying all the interest of the estate of James Hill in the partnership real estate. The notes which were thus delivered have been paid, and the terms of the settlement set out in the decree of the Probate Court and in the above named instrument have been fully complied with.

The plaintiff was called as a witness, and, among other things, testified that, after her appointment as executrix, there was a controversy between her and the defendant as to the

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amount due her on the settlement of the partnership account as such executrix; that she and the defendant had numerous interviews and conversations upon the subject; that, some time in the spring of 1889, she stated to the defendant that she would settle the whole matter for $10,000; that the defendant offered $6,000 in settlement, which she declined to accept; that at a later interview between them, in April, it was agreed that a settlement should be effected for $6,000, and one half of the bill of the expert accountant who had examined the partnership books; that $3,000 of that amount should be paid in cash and $3,000 by promissory notes of the defendant; that the defendant afterwards gave the plaintiff two promissory notes, signed by himself, of $1,000 each, payable to the plaintiff; that she accepted those notes on account of the agreed settlement, and was requested by the defendant to keep the fact of his giving the notes a secret, as otherwise he would have difficulty in raising the money to carry out the settlement; that she showed those notes to her counsel, and requested the defendant, previously to the final settlement, to give her new notes in substitution of those she already had, bearing the same date as the time of final settlement; and that the following letter, dated July 30, 1889, was received by her from the defendant in reply to her request: "I will change the notes I gave you some time ago, and give you two with date of day we pass papers in settlement of your claims in exchange for them. I will see Mr. Gaston, and get a day fixed for the finishing up of this business. The notes to read same as ones now in your hands." She also testified that, before the terms of settlement were finally agreed upon, she had been paid $250 on account of her claim as executrix against the defendant.

After the close of the defendant's evidence, the plaintiff was recalled, and further testified, that she made a settlement with the defendant in the spring, long before May 21, 1889, and the notes were given before May 21; that she never told the defendant that she wanted the notes to secure the settlement; that the notes in suit were written by the defendant in Mr. Gaston's office; that in the latter part of July, 1889, she insisted that the defendant should give her two notes to take the place of those she already held, and he agreed to do so by letter;

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that on August 23, 1889, she together with her counsel went to the office of the defendant's counsel to carry out the terms of the settlement; that before the papers were signed or executed she requested the defendant to step into the rear office, which he did, and, they being alone, she asked him to give her two new notes for $1,000 each, to take the place of the two which he had given her in the spring; that he thereupon did so, and she surrendered the other two notes; that she then returned with the defendant to the main office and told her counsel, in a whisper, that she had the notes, but without communicating the fact in any way to counsel for the defendant; that thereafter the $3,000 in cash was paid to her, the fourteen notes for $100 each were signed by the defendant and delivered to her, as also the bond of indemnity; and that she thereafter signed and delivered the instrument of release above set forth, and also the deeds of the real estate.

The defendant testified that he had given the plaintiff two notes for $1,000 each in May, 1889, because she wanted some guaranty that he would carry out the settlement, but that he told her at the time that they were not to be of any effect if the settlement was carried through; that on August 23 the plaintiff called him into the rear office of his counsel, and demanded two notes in place of the two which she held, but he told her they would not be any good if the settlement went through, but that she said she would take her chances of making it hot enough for him so that he would pay them; that he accordingly gave her the two notes in suit, in place of the other two which were surrendered; that he understood that, if he gave them to her, she would carry out the agreement; and that he did not know whether she would or not if he did not give them to her.

Neither the plaintiff, the defendant, nor the plaintiff's counsel communicated the giving of the notes to the defendant's attorneys at the time of the settlement.

The defendant requested the judge to rule as follows:

"1. It is not competent for the plaintiff to contradict or vary by oral testimony the terms of the release, or to show by oral testimony that the settlement embraced the delivery to the plaintiff of the two notes in suit, in addition to the cash and notes spe-

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cially mentioned in said release. 2. Upon all the evidence in the case, the notes in suit were discharged by the release. 3. It is not competent for the plaintiff to contradict or vary the terms of the release by oral evidence that it was given in consideration of the delivery to her of the two notes in suit in addition to the cash, notes, and bond of indemnity specified in said release. 4. Upon all the evidence in the case, there was no consideration for the notes in suit. 5. A claim on the part of the plaintiff, as executrix of the will of her husband, if any existed, was not a legal consideration for the notes in suit. 6. Upon all the evidence in the case, the plaintiff is not entitled to recover."

The judge refused to give these rulings, except the first part of the first ruling requested as far as the words "or to show"; found for the plaintiff, and assessed damages in the sum of $2,294.80; and also made the following finding of facts: "The court finds that the notes declared on in said action were given as a part of the consideration of the release of the plaintiff to the defendant, and that the same belong to the estate of her deceased husband, James Hill." The defendant alleged exceptions.

F. E. Snow, (*W. A. Gaston* with him,) for the defendant.

S. H. Tyng, for the plaintiff.

KNOWLTON, J. There was abundant evidence to warrant the finding of the justice of the Superior Court that the notes declared on were given as a part of the consideration for the release to the defendant, and that they belonged to the estate of the plaintiff's deceased husband.

The questions raised by the defendant's requests for rulings may be reduced to three: first, whether it was competent to prove that the notes were given as a part of the consideration of the release signed by the plaintiff as executrix, notwithstanding the recital in the release of a different consideration which does not include this; secondly, whether the notes, being given to the plaintiff in her own name, and not in her name as executrix, can be enforced, if founded on a consideration moving from her as executrix; and thirdly, whether they are barred by the release itself, which purports to discharge the defendant from all debts, demands, actions, or causes of action.

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1. It has repeatedly been held in this Commonwealth that the recital of a consideration in a deed does not preclude either party from showing an additional consideration; and it was competent for the plaintiff to show that the notes were given as a part of the consideration for the release, in addition to the consideration mentioned therein. *Wilkinson* v. *Scott*, 17 Mass. 249, 257. *Preble* v. *Baldwin*, 6 Cush. 549. *Clark* v. *Deshon*, 12 Cush. 589. *Twomey* v. *Crowley*, 137 Mass. 184. *Soule* v. *Soule*, 157 Mass. 451.

2. The fact that the notes were made payable to the plaintiff in her own name, without mention of her official relation as executrix, does not affect their validity. It is her duty to collect them and account for the proceeds as assets of the estate of the testator.

3. The release does not bar or discharge notes which came into existence as part of the transaction of giving the release, which were given as a part of the consideration for it, and which first took effect, to create a liability, at the instant when the release took effect. The release operated only on liabilities which were in existence when it was given.

Exceptions overruled.

FRANK C. BILL *vs.* CHARLES F. BOYNTON & another.

Suffolk. January 18, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Taxation of Costs — Joint Action against Maker and Indorser of Promissory Note — Answer — Costs of Appeal.

If, in an action against the maker and the indorser of a promissory note, begun in a municipal court, the defendants answer jointly, and, upon appeal to the Superior Court from judgment in their favor, they sever in their answers in that court, setting up different defences, they are entitled, upon prevailing, to separate costs in that court; and having prevailed upon an appeal to this court, they are to be allowed the costs of that appeal also.

APPEAL, from a taxation of costs in an action of contract begun in the Municipal Court of the city of Boston against the

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maker and the indorser of a promissory note, and in which one answer was filed for both defendants. Judgment was rendered for the defendants, and the plaintiff appealed to the Superior Court. Only one bill of costs was taxed for the defendants in the Municipal Court.

In the Superior Court, the defendants filed separate answers, setting up the same defence, and the indorser setting up an additional defence of no notice of non-payment by the promisor. At the trial, without a jury, the court found for the defendants. A separate bill of costs was taxed by the clerk for each defendant, and, on appeal to the court, the taxation was affirmed; and the plaintiff appealed to this court.

J. W. Keith, for the plaintiff.

G. R. Nutter, for the defendants.

HOLMES, J. "One of the defendants was sued as promisor, and the other as indorser, of a note; and though by statute they may be sued jointly, yet they must defend separately. The court properly held that each was entitled to tax his costs." *Taylor* v. *Jaques*, 109 Mass. 270. The distinction suggested between the present case and that is, that in this the defendants answered jointly in the Municipal Court and severally in the Superior Court only. It is said that, having elected to plead jointly, they must stand by their election. If this were true, it should have been urged as a reason for not allowing the defendants to plead severally. But there was no such conclusive election. Pub. Sts. c. 155, § 28; c. 154, §§ 39, 43. *Jaha* v. *Belleg*, 13 Allen, 78, 80. The defences were several in their nature, even if presented jointly; and when the defendants came to file written answers, they had a right to make them several in form as well as in fact. On this point the case is stronger, if anything, in favor of the defendants, than an action for a joint tort, and in cases of that sort it is settled that, if defendants who have joined below sever on appeal, they may be allowed several costs from the time of pleading severally. *Fales* v. *Stone*, 9 Met. 316, 318. *West* v. *Brock*, 3 Pick. 303. See *Prescott* v. *Bartlett*, 43 N. H. 298. In the taxation appealed from, there was no attempt to tax the plaintiff twice for expenses incurred for the common benefit. *Davis* v. *Hastings*, 8 Cush. 313, 315. *Fales* v. *Stone*, 9 Met. 316, 318.

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The defendants, having prevailed upon this appeal, are to be allowed the costs of this also. Pub. Sts. c. 198, § 27. *O'Connell* v. *Bryant*, 126 Mass. 232. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, 126.

Taxation affirmed, with costs of appeal.

LUCIUS W. CRAM *vs.* IRA L. MOORE.

Suffolk. January 16, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Motion for New Trial — Rule of Superior Court.

The Superior Court has no power to grant a motion for a new trial made by a party to an action, if the moving party has failed to comply with a rule of that court requiring him to cause a copy of the motion to be delivered to the adverse counsel on the day the same is filed.

MOTION for a new trial of an action in the Superior Court, in which a verdict was returned for the plaintiff.

The defendant, on the day after the verdict was returned, filed the motion in the office of the clerk of that court, on the ground that the verdict was against the evidence and against the weight of evidence, and on the same day notified the plaintiff's counsel, in writing, that such motion had been filed, but furnished him with no copy of the motion as required by Rule XLVI. of that court.* The plaintiff's counsel made no demand or request for a copy of the motion, and the defendant's counsel

* The rule is as follows: "No motion for a new trial shall be sustained in any civil action after verdict, either on account of any opinions or decisions of the judge, given in the course of the trial, or because the verdict is alleged to be against evidence or the weight of evidence, unless, within three days after the verdict is returned, the counsel of the party complaining of the proceedings or of the verdict shall file a motion for a new trial, specifying the grounds of his complaint, and cause a copy of the motion to be delivered to the adverse counsel on the day the same shall be filed; provided, however, that, for good cause shown, the time for filing such motion may be extended by the court."

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had no notice that any objection was to be made to the motion for the want of a copy thereof, until the hearing on the motion, which was sixteen days after the filing of the same.

Hopkins, J. overruled the motion, solely on the ground that the defendant had not complied with Rule XLVI.; and the defendant alleged exceptions.

J. W. Rollins, for the defendant.

W. C. Cogswell & F. C. Gilpatric, for the plaintiff.

BARKER, J. The presiding justice was right in overruling the motion for a new trial, because no copy of the motion had been delivered to the adverse counsel, as required by Rule XLVI. of the common law rules of the Superior Court. A general rule of court duly authorized and made has the force of law, and is binding upon the court and parties, and until repealed must be applied to all cases which come within it. *Thompson* v. *Hatch*, 3 Pick. 512. *Tripp* v. *Brownell*, 2 Gray, 402. *Webber* v. *Davis*, 5 Allen, 393, 394. *Baker* v. *Blood*, 128 Mass. 543, 545. The decision in *Dana* v. *Underwood*, 19 Pick. 99, when properly understood, is not an authority for the contention that the court can disregard a rule, or decline to apply it to a case which comes within it. There a sufficient notice that the party would be required to prove the genuineness of the signature had been given before the adoption of the rule, and the effect of the decision is that the case on that account was not within the operation of the rule requiring written notice of an intention to deny the signature.

The power of the court to set aside a verdict without the motion of either party is not in question in the present case; nor are we called upon to say whether, under the rule, the court may, after the expiration of the three days, extend the time for filing a motion for a new trial.

Exceptions overruled.

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WILLARD HOWE *vs.* AMY E. HOWARD.

Middlesex. January 16, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Value of Land — Evidence.

In an action in which the value of land is in controversy, evidence of the sum awarded by a jury for other land in the vicinity, taken by the Commonwealth under the right of eminent domain, is inadmissible.

CONTRACT, upon an account annexed, to recover a commission for selling the defendant's farm in Sherborn. The answer, among other things, alleged that the plaintiff, by conspiracy with certain other persons, fraudulently induced the defendant to execute an agreement to sell the farm to one of such persons for a price much less than its market value.

At the trial in the Superior Court, before *Richardson*, J., without a jury, the defendant called as a witness one Wellington H. Pratt, who testified, against the plaintiff's objection, that he received $600 an acre, or a little more, for sixteen acres of land, without buildings thereon, which land was near the defendant's farm, though in another town, by the verdict of a jury, as damages for the taking of the land by the Commonwealth under the right of eminent domain for a public use.

This evidence was admitted *de bene*, and was relied upon as material to the defence, the defendant contending that it tended to show the value of her farm.

The judge, at the close of the evidence and before the arguments, excluded the evidence; and the defendant excepted.

The judge found for the plaintiff; and the defendant alleged exceptions.

I. B. Forbes & E. A. Alger, for the defendant.

S. A. Phillips, for the plaintiff.

BARKER, J. Assuming that the land taken by the Commonwealth was similar to and in the same vicinity with that the value of which was in issue, and that the taking was sufficiently near in point of time to make evidence of a sale competent under the familiar rule stated in *Chandler* v. *Jamaica Pond*

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Aqueduct, 122 Mass. 305, testimony as to the amount received by its owner as damages awarded by a jury for its taking was incompetent. In *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316, 326, Dewey, J., after deciding that evidence of an actual sale of adjacent land was competent, said: "If it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible." A price so fixed represents only the opinion of those who make it, and, as the grounds and reasons of their opinion are not known, and they cannot be presumed to have been qualified experts, and cannot be subjected to cross-examination by the parties whose rights the evidence will affect, their opinion is not competent evidence to show the value of other land. In *White* v. *Fitchburg Railroad*, 4 Cush. 440, it was held that evidence of the amount paid under an award of arbitrators for adjoining land taken from another owner by the same defendant was rightly excluded. See also *Cobb* v. *Boston*, 112 Mass. 181, 184; *Providence & Worcester Railroad* v. *Worcester*, 155 Mass. 35, 40. *Exceptions overruled.*

MARY VENO *vs.* CITY OF WALTHAM.

Middlesex. January 16, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Defect in Sidewalk — Notice to City — Evidence.

In an action against a city for personal injuries the notice stated that "on said School Street near the junction of Spring Street with said School Street in said W., to wit, on the sidewalk on the south side of said School Street, about fifty feet from said Spring Street, I fell," etc. There were two places on the sidewalk on the south side of School Street near its junction with Spring Street, and about fifty feet from Spring Street; one of which places was east of the junction, and the other west, and each of which was equally well described. There was no intention to mislead the city. In addition to the fact that the two places, either of which might be the place designated, were in the same neighborhood, and each was so near the intersection of the two streets that any officer of the city who should examine the locality would naturally perceive the ambiguity, and be led to visit both places, and to inquire which was the scene of the accident, there was evidence that the city officials

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had fully investigated the facts relating to the accident and the place where it occurred, and that the plaintiff had stated all the circumstances to the committee on claims of the city government at a meeting, at which the city solicitor was present, held shortly after the service of notice, and at which the chief of police stated all the facts in his possession. The judge directed a verdict for the defendant. *Held*, that the notice was sufficient if it was shown that there was no intention to mislead, and that the city was not in fact misled thereby, and that the case should have been submitted to the jury.

TORT, for personal injuries occasioned to the plaintiff by reason of falling on a sidewalk situated in a highway which the defendant was bound to keep in repair.

At the trial in the Superior Court, before *Braley*, J., the plaintiff testified that she lived at No. 166 School Street, Waltham; that on March 9, 1890, she fell upon the sidewalk on the south side of School Street, about fifty feet east of Spring Street, a place almost in front of her door, and near No. 168 on School Street, and broke her wrist; and that her fall was occasioned by an accumulation of rough ice on the sidewalk. She then put in evidence a notice in writing to the defendant, which stated that "on said School Street near the junction of Spring Street with said School Street in said Waltham, to wit, on the sidewalk on the south side of said School Street, about fifty feet from said Spring Street, I fell and suffered serious bodily injury thereby." It was admitted that proper service of the notice was made upon the defendant on April 8, 1890. It was shown by the testimony of the city engineer that School Street ran east and west, and that Spring Street led from the south side of School Street at about a right angle. It was also shown that the plaintiff lived in the east tenement of a double house, situated on the corner of Spring and School Streets; that the north side of the house faced School Street, and the west end Spring Street; that on the north side of the house two doors, a few feet apart, opened into School Street; that one was numbered 166, and was the door leading into the plaintiff's tenement in the eastern half of the house; that the other was numbered 168, and led into another tenement in the western part of the house; that steps came down from each of these doors to within a few inches of the street line on the south side of School Street; that a point on the sidewalk on the south side of School Street, about thirty-five feet east from

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the east corner of School and Spring Streets, would be situated before the doorway of No. 166, and would be substantially the place described by the plaintiff in her testimony, and in her statements to members of the police department and to the committee on claims, as the place where the accident occurred; and that the plaintiff admitted that the notice would describe a spot on either side of Spring Street as the place of the accident. The judge ruled that the notice was insufficient. In order to cure any deficiency of the notice in describing the place of the accident, and to show that the defendant was not in fact misled thereby, the plaintiff testified that on April 4, 1890, the chief of police, together with a patrolman named Cater, called upon her at her house, and inquired the circumstances of the accident, and that she told them the circumstances, and the place where the accident occurred, substantially as she told them in her testimony; and that she subsequently appeared at a meeting of the committee on claims, at which the city solicitor was present, and there stated all the circumstances substantially as she told them in her testimony. It was agreed that the committee on claims was a committee of the board of aldermen of the city, whose duty it was to investigate all claims against the city referred to it by the board of aldermen, and to report thereon to the board; and that the meeting of the committee on claims at which the plaintiff appeared was held on April 23, 1890. A patrolman named Eastman testified that on April 4, 1890, while on duty as a police officer, he was informed of the time, place, and cause of the accident substantially in accordance with the testimony of the plaintiff; and that on that day he reported what he had so learned to the chief of police.

The defendant objected to the admissibility of the foregoing testimony, offered as tending to show that the city was not misled by the description in the notice of the place of the accident, but the evidence was admitted *de bene*. The plaintiff then offered testimony tending to show that on April 4, 1890, the chief of police, having learned of the accident from the patrolman Eastman, on the same day together with Cater visited the plaintiff at her residence, 166 School Street, and was fully informed by her of the time, place, and cause of the

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accident; and that the chief of police then returned to the police station, and on the same day recorded the facts stated to him by Eastman, and those learned by himself, in a book kept by him as chief of police at the police station, for the purpose of recording, among other things, in accordance with a regulation of the city government, such facts as came to the knowledge of the police department in relation to accidents on highways in the city; and that on or shortly after April 9, 1890, the chief of police informed the city clerk of the city of Waltham of the facts in his possession in relation to the accident. The plaintiff also offered testimony tending to show that the chief of police was summoned as a witness at the meeting of the committee on claims, and that he then stated to the committee all the facts in his possession relating to the accident. It was agreed that there was no intention to mislead the defendant by the form of the notice.

The judge ruled that, upon all the evidence in the case, and upon all the evidence offered, if admitted, there was no sufficient notice to the defendant of the time, place, and cause of the accident, and no evidence admitted or offered upon which the plaintiff was entitled to go to the jury as tending to show that the defendant was not in fact misled by any inaccuracy of the notice in stating the time, place, and cause of the injury; and upon that ground directed a verdict for the defendant; and the plaintiff alleged exceptions.

E. I. Smith, for the plaintiff, was not called upon.

B. B. Johnson, for the defendant.

BARKER, J. The notice was ambiguous in its statement of the place of injury, since there were two places on the sidewalk on the south side of School Street, near its junction with Spring Street and about fifty feet from Spring Street, one of which places was east of the junction, and the other west, and each of which was equally well described. Assuming that the notice was defective in the sense of the statute, it was nevertheless sufficient, if it was shown at the trial that there was no intention to mislead, and that the city was not in fact misled thereby. Pub. Sts. c. 52, § 19. St. 1888, c. 114, § 1. It was agreed that there was no intention to mislead, and the only question is whether the jury might properly find, from the evi-

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dence introduced and offered, that the city was not in fact misled. The ambiguity had very little tendency to mislead any one who should undertake to investigate the circumstances of the injury. The two places, either of which might be the one designated, were in the same neighborhood, and each was so near the intersection of the two streets that any officer of the city who should examine the locality would naturally perceive the ambiguity, and be led to visit both places, and to inquire which was the scene of the accident. Whether or not this, without evidence directly to the point, would justify an inference that the city was not misled, (*Bowes* v. *Boston*, 155 Mass. 344,) we are of the opinion that the evidence produced and offered was sufficient to justify a finding for the plaintiff upon that issue. Some of the city officials, even before the service of the notice, had been informed by the plaintiff and her attorneys of the exact place of the injury, and an investigation had been made by the chief of police, who had entered the particulars of the accident on the journal at the police station, in accordance with a regulation of the city government, and on the day after the service of the notice he informed the city clerk of the facts in his possession in relation to the accident, which facts included the correct statement of the place where it occurred. In addition to this, the plaintiff had stated all the circumstances to the committee on claims, whose duty it was to investigate all claims against the city, at a meeting of the committee at which the city solicitor was present, and which was held only fifteen days after the service of the notice, and at which the chief of police stated to the committee all the facts in his possession. The case should have been submitted to the jury.

Exceptions sustained.

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ALBERT METCALF & others *vs.* MAYOR AND CITY COUNCIL OF BOSTON & another.

Suffolk. January 16, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

City — Way — Order laying out Way.

A city is not bound, when a way is laid out, to make it safe and convenient for travellers through its entire width, if it is so wrought as to be reasonably fit for the public use for which it was designed.

The authorities of a city, in laying out a way, ordered "that the parcel of land before described be and the same hereby is taken and laid out as a public street or way of the said city with the name of M. Avenue, and the grade thereof is established, according to a plan of the said laying out and profile of the grade, made by" the city surveyor, of a certain date. *Held*, upon a petition by an abutter on the way for a writ of mandamus to the city, that the order laying out the way did not so prescribe the mode of constructing it that the city was bound to grade it to its full width.

PETITION, filed May 26, 1892, by Albert Metcalf, Gilbert A. Tapley, and Joseph A. Jackson, for a writ of mandamus to the mayor and city council of Boston and the superintendent of streets of the city. Hearing before *Allen*, J., who, at the request of the parties, reserved the case for the determination of the full court. The material facts appear in the opinion.

E. W. Hutchins & H. Wheeler, for the petitioners.

A. J. Bailey, for the respondents.

KNOWLTON, J. The street commissioners and the city council of the city of Boston laid out a street, two hundred feet wide and about two miles long, in that part of the city which was formerly Brighton. The centre of the street, to the width of sixty feet, has been wrought and fitted for public travel. The petitioners own a large tract of land abutting on the street, which they wish to sell or use for building lots, and they ask for a writ of mandamus to compel the city to grade the street, and fit it for travel through its entire width.

The fundamental question is whether, when a street or highway is laid out, the authorities are bound to make it safe and convenient for travellers through its whole width, if it is so wrought as to be reasonably fit for the public use for which it

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was designed. We think it is well settled in this Commonwealth that they are not. *Howard* v. *North Bridgewater*, 16 Pick. 189. *Smith* v. *Dedham*, 8 Cush. 522. *Keith* v. *Easton*, 2 Allen, 552. *Weare* v *Fitchburg*, 110 Mass. 334. The requirements of the Pub. Sts. c. 49, § 9, that the county commissioners, whenever a highway is laid out or altered, "shall in their return determine and specify the manner in which such new highway or alteration shall be made," implies that the way is not necessarily to be wrought through its entire width. In many places a sufficiently good way can be constructed without occupying nearly the whole of the land taken. Sometimes the existence of ledges or the necessity of carrying the road along steep hillsides, or of making deep cuts or high embankments, renders it almost impossible to grade the road from side to side of the location. It may be necessary, for the purposes of construction and repair, to include within the location much more land than is needed for the travelled path, and it is for the tribunal laying out the way to determine how much shall be taken for the location, and how wide the way shall be wrought for public use.

It is contended that the abutting landowners have a right to require the construction of the road up to the lines of their lots for convenience of access. Undoubtedly they have a right of access to the road from their lots; but roads are constructed for the use of the public, and there is no law requiring cities and towns to construct approaches from the houses or lots of adjacent landowners to the travelled part of the way, or to grade and construct the way up to the lines of the lots to enhance the value of the property. If the construction of the road in a reasonable way for public use will be likely to make access to the road from a neighboring lot difficult, and to require a large expenditure on the part of the owner in the construction of a passageway, that will be taken into account in assessing the damages.

The petitioners in the present case own the fee of the street to the centre opposite their land, and they have a right to make for themselves driveways to the wrought part of the street in any reasonable way which does not interfere with the use of the street by the public.

The only remaining question is whether the order laying out the street prescribes the mode of constructing it in such a sense

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that the city is bound to grade it to its full width. As we have already said, county commissioners, when they lay out a highway, are required by the statute to prescribe the mode of constructing it. Pub. Sts. c. 49, § 9. If the city or town fails to construct it in accordance with their order, it becomes their duty to construct it, and the cost can be collected from the city or town. Pub. Sts. c. 49, §§ 60, 61. If the county commissioners neglect to perform this duty, a writ of mandamus will be issued to compel them to do it. *Richards* v. *County Commissioners*, 120 Mass. 401.

By the charter of the city of Boston, the mayor and aldermen were given all the powers in regard to laying out streets that selectmen of towns had. St. 1821, c. 110, §§ 5–8, 11–15. St. 1854, c. 448. By the last mentioned statute they are also given all the powers of county commissioners. Selectmen of towns had power to lay out town ways and private ways, to be completely established by a confirmatory vote of the town. St. 1786, c. 67, § 1. Rev. Sts. c. 24, § 66. County commissioners can lay out highways. It would seem, therefore, that the mayor and aldermen of Boston, previously to the enactment of the law creating the board of street commissioners, could lay out town ways and report them for confirmatory action by the city council, and could also lay out highways in the performance of their duties as county commissioners. By the St. of 1870, c. 337, (Pub. Sts. c. 22, §§ 30, 31,) all the powers of the board of aldermen in regard to laying out streets are conferred on the street commissioners, with a provision requiring in certain cases a concurrent vote of both branches of the city council. This street was laid out under the authority of this statute, the mayor and aldermen and common council acting concurrently with the street commissioners. The street commissioners were not merely performing the functions of county commissioners, and it is at least doubtful whether the provisions of the Pub. Sts. c. 49, § 9, requiring county commissioners to specify the manner of construction of a way, and the time within which it shall be completed, were applicable to them.

The order is silent in regard to the time within which the work is to be completed, and also in regard to the manner of construction, except that the grade is given. Doubtless it would have been more in conformity with the usual mode of

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procedure in such cases, if details had been given showing the condition in which the street was to be left on completion; but we are of opinion that fixing a grade of the street cannot be deemed equivalent to a statement that the street is to be wrought to its full width, or to any particular width, in fitting it for the use of the public.* In the absence of such a statement, it was the duty of the authorities to construct it in such a way as the convenience of the public required. It is not contended that the way is too narrow for the safety and convenience of the public travelling upon it, and there is no ground on which the court can properly interfere by a writ of mandamus.

Petition dismissed.

INTERNATIONAL TRUST COMPANY *vs.* ERNST SCHUMANN.

SAME *vs.* SAME.

ERNST SCHUMANN *vs.* INTERNATIONAL TRUST COMPANY.

Suffolk. January 17, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Landlord and Tenant — Lease — Eviction — Breach of Covenant — Recoupment — Action.

In an action for arrears of rent due under a lease, a tenant who remains in possession until the end of his term cannot recoup, as for an eviction, or a breach of the implied covenant for quiet enjoyment, the damages alleged to have been occasioned by the landlord during the term entering upon the demised premises for breach of the covenants of the lease by the tenant, and bringing an action to eject the tenant, who recovered judgment therein, and with knowledge that the premises were of value to the tenant only for his business of a common victualler and seller of liquors, causing the license commissioners to refuse him a license for the sale of liquors, and also causing his license as a common victualler to be taken from him wrongfully; nor can the tenant maintain an action of contract against the landlord upon the same facts.

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* The order was as follows: "Ordered, that the parcel of land before described be and the same hereby is taken and laid out as a public street or way of the said city with the name of Massachusetts Avenue, and the grade thereof is established, according to a plan of the said laying out and profile of the grade, made by T. W. Davis, City Surveyor, dated July 28, 1883, and deposited in his office."

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THREE ACTIONS. The first case was an action of contract, the declaration in which contained two counts, the first of which alleged that, on October 5, 1885, the defendant, August Oschwald, and George P. Upham entered into a written lease, a copy of which was annexed, of the basement of the building situated on the corner of Devonshire Street and Milk Street, in Boston, for a term of five years; that, by the terms of the lease, the defendant and Oschwald agreed to pay an annual rent of $2,000, payments of $500 to be made quarterly upon the first days of April, July, October, and January of each year, and further agreed to pay one tenth of the taxes assessed upon the land and building on November 1 of each year, a fair proportion of the water rates upon the first days of April, July, October, and January of each year, and thirty dollars for steam heat on January 1 of each year; that the plaintiff, on April 1, 1889, became the owner of the land and building by mesne conveyance from Upham, and was still the owner thereof; that prior to April 1, 1889, Oschwald had given up possession of the premises, and the defendant was alone in possession, and so remained until the expiration of the lease, and made the payments to the plaintiff in accordance with the terms thereof up to and including October 1, 1889; that he failed to pay the amount due on January 1, 1891, namely, $535 for rent, water rent, and steam heat; and that the defendant owed the plaintiff the sum of $535, with interest thereon. The second count alleged, in substance, that the defendant further agreed by the lease to keep the premises in such repair as they were in at the time of making such lease, or might be put in during the continuance thereof, careful and reasonable use and wearing thereof and damage by fire excepted, to restore the premises, as to the glass thereon, in the same condition and with the same quality as at the time of making the lease, and peaceably to surrender at the expiration of the lease the premises, and all future erections and additions to or upon the same, in good tenantable repair in all respects, damage by fire excepted; that during the continuance of the lease the defendant allowed the premises to get out of repair, and the want of repair was not caused by the reasonable use and wearing thereof, that the glass thereon was broken, and he had failed to restore the same; and that the lease expired on January 1, 1891, and the defendant, though requested, did not peaceably surrender the premises and erec-

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tions and additions made thereto in good tenantable repair, to the great damage of the plaintiff.

The answer contained a general denial, and also alleged that the plaintiff entered upon the premises leased by the defendant, and notified the defendant that he took possession of the same while the lease was still in force, and subsequently thereto brought against the defendant a writ to eject him from the premises and prosecuted the action, alleging that the defendant had broken the covenants in his lease, in which action the Superior Court rendered judgment for the defendant; and that the plaintiff thereby interfered with the quiet enjoyment of the premises by the defendant, and caused the defendant great expense and damage.

THE SECOND CASE was an action of contract, the declaration in which contained seven counts. The first six counts were for the amounts due for rent, water rates, taxes, and steam heat, under the terms of the lease declared on in the first case, down to and including November 1, 1890. The seventh count was upon an account annexed for $2,587.22, being the aggregate of the sums declared for in the first six counts.

The answer was the same as that in the first case, and the defendant also filed the following additional answer: "And the defendant further answering says that, if the defendant occupied said premises, he so occupied the same for the purpose of carrying on the business of a common victualler and for the sale of intoxicating liquors; that the only value of said premises to him was the carrying on of said business; that this was known to the plaintiff at the time he purchased the building and assumed the lease which the defendant had entered into with the plaintiff's assignor; that the plaintiff, well knowing this and being desirous of obtaining possession of the premises occupied by the defendant, as a means of securing the same and dispossessing the defendant, made objections to the license commissioners issuing a license for the sale of liquors by the defendant, for which he had made application, and by reason whereof the license was refused; and the defendant says that the plaintiff, intending further to injure the defendant and enjoy the beneficial enjoyment of the said premises, and to obtain possession of the said premises, caused his license as a common victualler to be revoked wrong-

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fully and without right, whereby the business, to carry on which he hired the premises, was broken up and ruined, and great damage done to him."

THE THIRD CASE was an action of tort or contract, the declaration in which, after setting out the execution of the lease declared on in the other two cases, the assignment by Oschwald of his interest therein to the present plaintiff, and the conveyance of the premises by Upham to the present defendant, further alleged that, by the purchase, the defendant assumed all the covenants and stipulations in the lease; that the plaintiff, since the occupation of the premises, had carried on a restaurant as a victualler to provide and furnish food and drink to the public; that during the time of his occupation for that purpose he had carefully performed the conditions of the lease, and had never violated the same; and that the defendant, since it came into possession and control of the premises, had not lived up to the conditions in the lease, but had wantonly and wilfully violated the same in this, among other things, that it had obstructed the plaintiff in the enjoyment of the premises, to the great damage of the plaintiff in his business. The plaintiff also set up, by amendments to his declaration, the allegations contained in his answers in the first two cases. Answer, a general denial.

The three cases were tried together in the Superior Court before *Thompson*, J., without a jury. The defendant in the first two cases offered, by way of recoupment, to prove the allegations set forth in his answers. The judge ruled that the defendant could not offer such proof; and the defendant excepted.

The plaintiff in the third case offered to prove the facts alleged in his declaration, by way of recoupment to the claims declared for in the first two cases, or by way of damages for the disturbance of the plaintiff in the enjoyment of his rights under the lease. The judge ruled that the plaintiff could not offer the proof for either of such purposes; and the plaintiff excepted.

The judge found for the International Trust Company in each case; and Schumann alleged exceptions.

E. Avery, for Schumann.

R. M. Morse & M. Morton, for the International Trust Company, were not called upon.

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BARKER, J. Of the parties to these actions between landlord and tenant, the latter, having remained in possession until the end of the term demised, now alleges as an eviction the fact that during the term his landlord entered on the premises under claim of right to repossess them for breach of covenants by the tenant, and brought a process to eject the tenant, on which final judgment for the tenant was rendered; and he further alleges, as breaches of the implied covenant for quiet enjoyment, the same entry and suit, and the fact that the landlord, knowing that the premises were of value to the tenant only for his business of common victualler and seller of liquors, caused the license commissioners to refuse him a liquor license, and also caused his license as a common victualler to be taken from him wrongfully and without right. None of these acts were an eviction of the tenant, or an ouster equivalent to an eviction, for the reason that he remained in the occupation of the premises until the end of his term. *Fuller* v. *Ruby*, 10 Gray, 285. *Bartlett* v. *Farrington*, 120 Mass. 284, and cases cited. *Skally* v. *Shute*, 132 Mass. 367, 370. *Lounsbery* v. *Snyder*, 31 N. Y. 514. *Bennet* v. *Bittle*, 4 Rawle, 339. *Hannam* v. *Woodford*, Skin. 300. And for the same reason, if for no other, none of them worked a breach of the implied covenant for quiet enjoyment. *Ellis* v. *Welch*, 6 Mass. 246, 252. *Dexter* v. *Manley*, 4 Cush. 14. *George* v. *Putney*, 4 Cush. 351, 355. *Gardner* v. *Keteltas*, 3 Hill, (N. Y.) 330. *Mayor & Aldermen of New York* v. *Mabie*, 3 Kernan, 151. *Frost* v. *Earnest*, 4 Whart. 86. *Schuylkill & Dauphin Railroad* v. *Schmoele*, 57 Penn. St. 271. *Moore* v. *Weber*, 71 Penn. St. 429. *Hayner* v. *Smith*, 63 Ill. 430. *Gazzolo* v. *Chambers*, 73 Ill. 75.

The entry was a formal one, not interrupting the tenant's occupation, and doing him no damage. The process was not a malicious suit, and for it his costs as the prevailing party are the only remedy. *White* v. *Dingley*, 4 Mass. 433. *Lindsay* v. *Larned*, 17 Mass. 190. *Fisher* v. *Barrett*, 4 Cush. 381, 384.

Assuming that the entry and suit were an unjustifiable attempt to oust the tenant, which, if he had yielded, would have been an eviction and a breach of the covenant, as he did not yield and was never ousted, the entry was at most a mere trespass, for which he might recover nominal damages in a suitable action, but not in his present suit, which, by his declaration,

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he has elected to treat as an action of contract for breach of covenant.

The alleged acts of the landlord with reference to the tenant's licenses from public authorities had no tendency to interrupt, and did not interrupt, the tenant's possession. See *De Witt* v. *Pierson*, 112 Mass. 8, 11; *Groustra* v. *Bourges*, 141 Mass. 7; *Stevens* v. *Pierce*, 151 Mass. 207; *Dennett* v. *Atherton*, L. R. 7 Q. B. 316; *Newby* v. *Sharpe*, 8 Ch. D. 39; *Chicago Legal News Co.* v. *Browne*, 103 Ill. 317; *McLarren* v. *Spalding*, 2 Cal. 510; *Connor* v. *Bernheimer*, 6 Daly, 295, 299; *Baughman* v. *Portman*, 14 S. W. Rep. 342; *Abadie* v. *Berges*, 41 La. An. 281.

As the tenant could neither recoup nor recover, the rulings were right. *Exceptions overruled.*

DAVID R. LEYDECKER *vs.* NORMAN Y. BRINTNALL.

Suffolk. January 17, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Landlord and Tenant — Covenant — Neglect to keep Approaches in Repair — Ignorance of Landlord — Instructions to Jury.

A lessee's covenant to save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering from the premises so leased," does not have the effect to give to the lessee the sole occupancy of the sidewalk in front of the lessor's building, or bind him to keep the same in general repair; and the rule of law as to a landlord's responsibility for defects in the approach to a stairway used by several tenants is applicable.

In an action for personal injuries occasioned to the plaintiff by falling on one of the approaches to a building leased by the defendant, the latter's request for an instruction, that the mere fact that he retained the use of one or two rooms in the building did not conclusively determine that he had control of the approaches, was held to be rightly refused.

An owner of land bounding on a street cannot escape liability for neglect to keep in proper repair the approaches to his tenement, which is let to tenants, by saying that he did not know where his boundary line was, or that he did not know that the approaches were out of repair.

The proper time to present requests for instructions is before the charge, and not after, unless there are circumstances making it necessary to call attention to some matter of detail or some phase of the case which has been overlooked or inaccurately dealt with.

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TORT, for personal injuries. At the trial in the Superior Court, before *Bishop*, J., there was evidence tending to show that the defendant, who was a livery stable keeper, owned two estates and buildings, Nos. 35 and 37 on Chapman Street in Boston. There was a passageway three or four feet wide between these two buildings, which was used solely as an entrance from the street to the rooms above the ground floor of the building numbered 35. There was a stairway leading from a point within the passageway about three inches from the street within the defendant's line on one side of the passageway, and about eighteen inches on the other side. The triangular space thus formed was bricked over on the same level with the sidewalk in front of the building, without any line of demarcation between the same and the sidewalk, but was within the defendant's line of ownership as shown by his deed. The lines of his deed ran to Chapman Street, and the legal line of Chapman Street included part of the defendant's buildings, but did not include this space in question. The stairway led to the second story of the building numbered 35, ending there with a landing and doorway. The sidewalk in front of the building was brick, and the triangular space between the street line and the first step of the stairway was also brick. The injury was alleged to have been caused by a defect or want of repair in the bricked paving in the triangular space near the first step of the stairway. There were two water conductors, one on each side of the space attached to each of the buildings owned by the defendant, which conducted the water from the roofs of the buildings to the ground, one of which discharged water upon the bricked triangular space, and the other upon the sidewalk within a foot of the space.

The stairway which led from the passageway to the second story ended there at a landing and doorway. A hall led from this doorway, at right angles, across the buildings, and the stairs leading to the third and fourth floors started from the farther end of the hall on the inside of the building. From this hall a door opened into the front office leased by Wheeler, hereinafter referred to, on one side, and on the other side of the entry a door opened into two large rooms which were occupied or controlled by the defendant. These, with the front office and entry, comprised all of the second floor.

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The defendant leased to one Wheeler the front office on the second floor of the building No. 35, with the third and fourth floors entire, and the lease contained the provision that the lessee covenanted to save the lessor harmless from any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering from the premises so leased. The premises leased included all the rooms reached by the stairway and hall, except the two rooms occupied and used by the defendant as above stated. These two rooms were a harness-room and hay loft on the second floor, and were reached by the stairway and hall above referred to, and there was also access to them directly from the defendant's stable, which included the ground floor of both buildings, by means of a hanging step ladder, between the part of the premises where the horses were in the rear of No. 35 and the hay loft above it, which step ladder could not be reached from Chapman Street except by going through the defendant's adjoining building No. 37. The main entrance to the stable was on Chapman Street in building No. 37, and was within eight to ten feet of the passageway and stairway in question, and there was no direct connection between the ground floor of the stable and the stairway and triangular space. The defendant's lessee, Wheeler, sublet one of the rooms to tenants, and occupied the rest of the premises himself. The plaintiff was one of Wheeler's employees, and had occasion to use the outside stairway and passageway in entering and leaving his place of employment. The evidence of the plaintiff tended to show that, at noon on September 25, 1888, the plaintiff, in the performance of his duties and in the exercise of due care, was descending the outside stairway to the passageway and street, and that as he stepped from the lower step of the stairway upon the passageway the bricks in the passageway within fifteen inches of the stairway and within the triangular space sank under him, whereby he was thrown down and his leg was broken. The plaintiff testified that at the foot of the stairway he had noticed from time to time, for two or three weeks, a depression in the bricks at the triangular space. There was no evidence that the defendant had actual knowledge of the defect in question, unless it could be inferred from the facts and circumstances stated herein. There was evidence that

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in times of rain surface water had been noticed by the plaintiff and others in the place where the depression existed in the triangular space, and that the position of the water conductors was such that water discharged in times of rain from the conductors would flow and remain upon the depressed area at the foot of the stairway. There was a conflict of testimony on the question of the use of the stairway and entry by the defendant's employees to reach the harness-room and hay loft on the second floor of the building. There was evidence that the defendant allowed a certain house painter to use the harness-room or hay loft in question for a few days to paint some blinds, and that the painter's men used the passageway, entry, and stairway in question in entering and leaving the hay loft. There was evidence also that employees of the defendant in his stable, and his stable foreman, went up and down the passageway and stairway to the harness-room and loft, and that the defendant's foreman used the passageway and stairway sometimes every day, sometimes several times a week, as he had occasion to do so in the defendant's business; and that the defendant kept in his desk in his stable office a key to the outside door at the head of the stairway, which his foreman and employees could use when the door was locked; and that after the accident one of the defendant's employees placed a plank or board at the foot of said stairway over the place where the bricks had caved in. One Stone, a carpenter, called by the defendant, testified that he had been employed by Wheeler to board up the space at the top of the outer stairs four or five feet high, also to put a hand rail on the stairs, and that also in 1889 he was employed by Wheeler to put in a stairway from the second to the third floor in the outside passageway. On cross-examination, he said these were additions to the place. The defendant testified that, although the harness-room and hay loft could be reached by the outside stairway in question, in fact they were used in connection with his stable on the lower floor, and were reached by the hanging step ladder leading directly from the stable to the hay loft. He also testified that he had no key to the only door opening from said outside stairway; that Wheeler, his tenant, had the key to said door. The defendant stated that he did not know that the triangular space was within his line. The defendant held the

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premises by deed, and it appearing that the deed under which he claimed and held the premises included the triangular space, he was asked, for the purpose of showing that he did not know that he owned it, "Did you have any knowledge that the triangular space belonged to you?" The question was objected to, and excluded, and the defendant excepted.

The judge instructed the jury, among other things, as follows:

"Where a portion of an estate is leased to a person, the landlord himself retaining control of all the rest, including the approaches, the landlord is responsible for the condition of the approaches to the building, . . . places over which the tenant or any particular tenant has occasion to pass. So, where different parts of a building are leased to different tenants, with the right in tenants to use in common the approaches, stairs, and passageways which are not let, the landlord is liable to a tenant, or to a stranger rightfully and with due care using such approaches, stairs, and passageways, for injuries caused by defects in their construction or want of repair; and the same principle applies where the owner himself retains portions of the premises in his own possession and under his own control. . . .

"The defendant, I think, testified upon the stand that he did not know of this defect. It is not necessary that he should have known of it in order to be liable for it. If by the exercise of due care concerning these premises and this approach, of which, if the evidence is as the plaintiff claims, he had the charge, — if by the exercise of due care concerning that, he could have learned the condition of the premises, he was bound to know what the condition of the place was. . . .

"The conductors coming down from the house are an element for your consideration in this case. If these conductors, or either of them, were so constructed that at times they emptied water upon the walk where the plaintiff fell, and such water caused the defect, in whole or in part, it is competent for you to consider that fact, it is one of the facts and one of the elements in the case. It is competent for you to consider what results might naturally be expected from that fact upon the question whether the defendant was negligent or not; because the defendant is bound to provide against defects which would naturally and probably arise from any existing state of things."

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The defendant presented no requests to the judge before the charge, but after the charge was delivered requested the judge to instruct the jury that the mere fact that the landlord retained the use of one or two rooms in a building leased to a tenant did not conclusively determine that the landlord had control of the approaches. The judge declined then to give this instruction, on the ground that the subject of the defendant's liability had been sufficiently covered by the charge, and that to reopen the subject as to one particular might be to distort the relations of that particular in the minds of the jury. The defendant excepted. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. Hemenway & P. J. Doherty, for the defendant.

R. M. Saltonstall & H. E. Bolles, for the plaintiff.

ALLEN, J. The defendant contends that the triangular space where the accident occurred passed to his lessee, Wheeler, under the lease, as an appurtenance to the premises leased. This point is not now open, it not being shown by the bill of exceptions that it was taken at the trial. There was no ruling upon it by the court. If the point were open, it is impossible to say, as matter of law, that this space passed as an appurtenance under the lease. The lease does not include the stairway nor the approaches thereto. The lessee's covenant to save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering from the premises so leased," was one which he had a right to make, if he saw fit to do so; but it could hardly be contended that it had the effect to give to the lessee the sole occupancy of the sidewalk in front of the defendant's stable, or that it bound him to keep the same in general repair. The whole argument resting on the assumption that Wheeler was bound by his lease to keep this space in repair, and that the defendant was exonerated from that duty, fails.

This being so, the general rule of law as to a landlord's responsibility for defects in the approach to a stairway, used by several tenants, is applicable. *Looney* v. *McLean*, 129 Mass. 33. *Watkins* v. *Goodall*, 138 Mass. 533.

The defendant's request for an instruction, that the mere fact that the landlord retained the use of one or two rooms in a building leased to a tenant did not conclusively determine that

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the landlord had control of the approaches, was rightly refused. The proper time to present requests for instructions is before the charge, and not after, unless there are circumstances making it necessary to call attention to some matter of detail or some phase of the case which has been overlooked or inaccurately dealt with. There had been nothing in the charge to signify that the mere fact referred to, under all circumstances, would conclusively determine that the landlord had control of the approaches. The statement that "the same principle applies where the owner himself retains portions of the premises in his own possession, and under his own control," obviously refers to what has been said just before, as to different tenants who have the right to use the approaches in common, and could not have been understood to apply to the case of a landlord who retained portions of the premises in his own possession, with no right to use the approaches in common with his tenant or tenants of other portions of the building. There was in this case no dispute that the defendant and his employees had a right to use the stairway and approaches to gain access to the rooms reserved by him on the second floor, if they wished to do so. The only conflict of testimony was as to the extent of the actual use thereof.

Proof of the defendant's ignorance of his true boundary line was properly excluded. As between him and his tenants, he was bound to know. The city was not bound to keep the triangular space in repair. *Damon* v. *Boston*, 149 Mass. 147, and cases cited. An owner of land bounding on a street cannot escape liability for neglect to keep in proper repair the approaches to his tenement, which is let to tenants, by saying that he did not know where his boundary line was. He owed to his tenant and those employed by such tenant the duty not to expose them to a dangerous condition of the place, which reasonable care on his part would have prevented. *Holmes* v. *Drew*, 151 Mass. 578. And this duty is not rendered the less by his ignorance of his true boundary line. *Foley* v. *McCarthy*, 157 Mass. 474. If it was not the defendant's duty to keep this place in proper repair, then it was nobody's duty.

The ruling that it is not necessary that the defendant should have known of the defect, in order to be liable for it, was right. *Lindsey* v. *Leighton*, 150 Mass. 285.

Exceptions overruled.

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IN RE PETITION OF MAYOR AND ALDERMEN OF NORTHAMPTON.

Hampshire. January 19, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Grade Crossing — Statute — Constitutional Law.

A petition was brought by the mayor and aldermen of the city of N., under the St. of 1890, c. 428, for the abolition of certain grade crossings in that city. Commissioners were appointed; and, after the finding of their report and a motion to confirm the same, and before the court had made any final decree, the St. of 1892, c. 311, was passed, which provided that no change shall be made in the grade of the public ways in N. where the same are now crossed by one or more railroads at grade, without the consent of the city council expressed by vote duly recorded, and that before a final decree a copy of such vote certified by the city clerk shall be filed in the case. No vote was passed by the city council and no certificate filed in the case. The judge ruled, in a hearing on the petition, that the St. of 1892, c. 311, was not within the power of the Legislature, and void; that the consent of the city council was not necessary to a final decree in the case, and made a final decree confirming the report thereon. *Held*, that the proceeding could not be considered as a suit for the determination of private vested rights, of which the parties could not be deprived except by a taking for a public use and the payment of reasonable compensation; that it was merely a quasi judicial proceeding for enforcing the laws regulating a subject within the control of the Legislature and that the statute was valid. KNOWLTON, LATHROP, and BARKER, JJ. dissenting, on the ground that the statute should be construed only as a direction to the court in regard to the decree to be entered in a particular case pending at the time of its enactment, and not as an amendment of the general law in regard to grade crossings, establishing for all time and in all proceedings a different rule for the change of the crossings mentioned in the petition from that applicable to other crossings in the city and in the State; and that, as so construed, it was unconstitutional.

PETITION of the mayor and aldermen of the city of Northampton, under the St. of 1890, c. 428, for the abolition of certain grade crossings in that city.

At the trial in the Superior Court, before *Aldrich*, J., it appeared that commissioners were duly appointed, and after the filing of their report and a motion to confirm the same, and before the court or any justice thereof had made a final decree in the case, the St. of 1892, c. 311, was passed, which statute is as follows:

"Section 1. In the proceedings now pending in the Superior Court for the abolition of certain grade crossings in the city of Northampton, no change shall be made in the grade of the public

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ways in said city where the same are now crossed by one or more railroads at grade, without the consent of the city council of said city expressed by vote thereof duly recorded.

"Section 2. Before the court or any justice thereof shall make a final decree in said case a copy of such vote certified by the city clerk shall be filed in said case.

"Section 3. This act shall take effect upon its passage."

No vote required by the first section has been passed by the city council, and no certificate required by the second section filed in the case.

The judge ruled that the St. of 1892, c. 311, was not within the power of the Legislature, and void; that the consent of the city council was not necessary to a final decree in the case, and made a final decree confirming the report as to certain streets, and rejecting it as to one street, and reported the case for the determination of this court.

The case was argued at the bar in January, 1893, and afterwards was submitted on the briefs to all the judges.

T. G. Spaulding, (*R. W. Irwin* with him,) for the petitioners.

W. G. Bassett & G. D. Robinson, for the respondents.

FIELD, C. J. None of the parties to this proceeding contend that any one of the provisions of St. 1890, c. 428, as amended by St. 1891, cc. 33, 123, 262, and St. 1892, c. 312, is unconstitutional. The petitioners, however, contend that St. 1892, c. 311, is unconstitutional, and the justice of the Superior Court so held; if this ruling is erroneous, the decree is to be set aside. It is not denied that the subject of the crossing of highways and town ways by railroads is one which the Legislature may regulate from time to time, either by general or special laws. The Legislature may itself prescribe the manner in which a railroad shall cross a highway in a particular case, or may delegate to a board of public officers, or to commissioners appointed by a court, the power to prescribe the manner in which the general or special provisions of law on the subject may be carried into effect. Any alleged errors of law in the proceedings of such boards are usually reviewed by this court on certiorari; but errors of law in the proceedings of such commissioners usually come before the court which appoints them, on some motion to confirm, or reject, or recommit the report, and thence by appeal, exceptions, or report to this court. The Legislature itself can also apportion the ex-

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penses incurred in making the required changes in the grade of such crossings, or can confer upon such boards or commissioners the power to apportion the expenses in accordance with such rules as it may prescribe. This has been held to be within the authority granted by the Constitution to the General Court to make "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," and to be an exercise of what is called the police power of the Commonwealth for the protection and safety of the public. Const. Mass. pt. 2, c. 1, art. iv. No municipality has any vested right to have such crossings maintained in any particular manner, but they may be changed from time to time, as from the growth of population or other causes the Legislature may think the public interests require. A railroad corporation also, especially when its charter is subject to alteration, amendment, or repeal at the pleasure of the Legislature, must make such changes in the grade of its road and the construction of its track as the Legislature from time to time may require. Neither is it necessary that the laws on the subject be uniform throughout the Commonwealth. From the very nature of the subject, the regulations which reasonably may be required must vary with the circumstances, and the Legislature may well adopt different rules for different crossings; it may make special provisions for some crossings, and general provisions for others, or leave the matter to the discretion of the board of commissioners upon whom it may confer the power of deciding. See *Boston & Lowell Railroad* v. *Winchester*, 156 Mass. 217; *Cambridge* v. *Railroad Commissioners*, 153 Mass. 161; *Kingman, petitioner*, 153 Mass. 566; *Spaulding* v. *Nourse*, 143 Mass. 490; *New York & New England Railroad* v. *Boston*, 127 Mass. 229; *Worcester & Nashua Railroad* v. *Railroad Commissioners*, 118 Mass. 561; *Boston & Albany Railroad* v. *County Commissioners*, 116 Mass. 73; *Brewer* v. *Boston, Clinton, & Fitchburg Railroad*, 113 Mass. 52; *Mayor & Aldermen of Worcester* v. *Railroad Commissioners*, 113 Mass. 161; *Mayor & Aldermen of Worcester* v. *Norwich & Worcester Railroad*, 109 Mass. 103; *Commonwealth* v. *Eastern Railroad*, 103 Mass. 254; *Hingham & Quincy Bridge* v. *Norfolk*, 6 Allen, 353; *Fitchburg Railroad* v. *Grand Junction Railroad*, 4 Allen, 198; *Roxbury* v. *Boston & Providence Railroad*, 6 Cush. 424; *Cambridge* v. *Charlestown Branch Railroad*, 7 Met. 70; *Norwich* v. *County Com-*

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missioners, 13 Pick. 60; Pub. Sts. c. 112, §§ 119–138; Gen. Sts. c. 63, §§ 46–63; Rev. Sts. c. 39, §§ 66–70; St. 1885, c. 194; St. 1874, c. 372, §§ 90–95; St. 1872, c. 262; St. 1846, c. 271; St. 1842, c. 22.

If, then, St. 1890, c. 428, had made special provisions for the railroad crossings at grade in the city of Northampton, and had required the consent of the city council of that city before the grade of the public ways in the city, where they are crossed at grade by one or more railroads, should be changed under the provisions of that chapter, there would seem to be no valid objection to such legislation. If St. 1892, c. 311, can be construed to be an amendment of St. 1890, c. 428, and to provide that the grade of the public ways in the city of Northampton, described in the petition, where they are crossed by railroads at grade, should not be changed without the consent of the city council, it would, we think, be open to no valid objection, and the fact that it was made to apply to a case then pending under the original statute would not render the act void. At any time before a final decree is rendered in this cause, the Legislature can repeal the statutes under which it proceeds, and thus prevent any decree from being rendered in it. As the whole subject of the crossing of highways by railroads can from time to time be regulated by the Legislature, the Legislature can, even after a final decree has been rendered, make other provisions, and require the crossings to be constructed in a manner different from that established by the decree. The Legislature can amend the statutes under which this proceeding has been commenced, and if the amended act is made applicable to the pending proceeding and is valid, the court in rendering a final decree must proceed in accordance with the statutes as amended. *State* v. *Wheeling & Belmont Bridge Co.* 18 How. 421. *Davis* v. *Sawyer*, 133 Mass. 289. *Sawyer* v. *Davis*, 136 Mass. 239. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386.

It results from this view that the present proceeding cannot be considered as a suit for the determination of private vested rights, of which the parties cannot be deprived except by a taking for a public use and the payment of reasonable compensation. It is merely a quasi judicial proceeding for enforcing the laws of the Commonwealth regulating a subject which is within the control of the Legislature. As was said in *New London Northern*

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Railroad v. *Boston & Albany Railroad*, 102 Mass. 386, 387, in a somewhat similar case, the powers and duties of the court "belong to that class not strictly judicial, but partaking both of the judicial and the executive character, like those of laying out highways and assessing damages therefor, superintending the administration and distribution of the estates of insolvent debtors, and many others which might be named, the exercise and control of which may be vested by the Legislature at its discretion, unless restrained by specific constitutional provisions, either in judges appointed by the Governor and holding during good behavior, or in commissioners or other officers appointed or elected in such manner and holding for such terms as the Legislature may prescribe."

It is argued by the counsel for the respondents, that St. 1892, c. 311, cannot be considered as enacting that the grade of the public ways at the crossings which are described in the petition shall not be changed without the consent of the city council of the city of Northampton, but that the statute is merely an arbitrary direction by the Legislature to the courts not to render a decree in the pending proceeding according to the law applicable to the case without the consent of the city council of Northampton. The respondents contend that, if for any reason the present petition should be dismissed and another similar petition brought, this statute would not apply to the new proceeding; and that the Superior Court must proceed with the new petition according to St. 1890, c. 428, as amended by other statutes, and not by this, and might enter a decree therein without the consent of the city council. Such a construction undoubtedly finds some support in the form of the statute, but in the opinion of a majority of the court this is not the true construction. It probably never occurred to the Legislature in passing this statute, that other proceedings could be had before the Superior Court with respect to the grade crossings described in the petition. For reasons unknown to us, and upon the sufficiency of which, if we knew them, we could judicially have no opinion, the Legislature determined that in the city of Northampton the grade crossings described in the petition should not be altered in the pending proceeding so as to change the grade of the public ways without the consent of the city council. A slight change in the phraseology would have made it plain that the act was

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intended as an amendment of the preceding statutes, so far as the grade crossings described are concerned. If the first section had begun with the words, "In the city of Northampton," etc., and had proceeded as it now reads, and the words, "This act shall apply to any case now pending," had been added, we could have no doubt that it would have effected a change in the law concerning all the grade crossings in the city of Northampton, and that it would be the duty of the Superior Court and of this court in the pending proceeding to administer the law applicable to the subject matter as it existed when the decree was to be made. The statute as enacted does not relate to all the grade crossings in the city, but only to such as are described in the pending proceeding; but the scope of the statute is made certain by the reference. We are unwilling to construe the peculiar phraseology of the statute as intended by the Legislature to direct the courts to proceed in the pending case in any other manner than according to the law applicable to the subject matter of the petition as understood by the courts. If a statute reasonably can be so construed as to be within the constitutional power of the Legislature, it should receive this construction. A majority of the court think that there is no insuperable difficulty in giving such a construction to this statute as will avoid the constitutional objection which has been made to it, and are of opinion that the statute was intended to change the law applicable to the grade crossings described in it, and that as such it is valid. The result is that the decree is to be set aside. The other questions in the case may never arise, or, if they do, may come before us in a different form, and we do not now consider them.

Decree set aside.

Justices KNOWLTON, LATHROP, and BARKER dissent, on the ground that the St. of 1892, c. 311, should be construed only as a direction to the court in regard to the decree to be entered in a particular case pending at the time of its enactment, and not as an amendment of the general law in regard to grade crossings, establishing for all time and in all proceedings a different rule for the change of the crossings mentioned in the petition from that applicable to other crossings in the city and in the State. So construed, they are of opinion that the statute is unconstitutional.

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JAMES KERRIGAN *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. January 19, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Collision of Vehicles.

In an action for personal injuries it appeared in evidence that the plaintiff's wagon and the defendant's street car were attempting to go around a corner from one street into another in opposite directions; that as there was a block of vehicles it was difficult to make safe progress; that immediately before the accident the wagon and the car were both on the corner, and both stationary on account of the block, the head of the plaintiff's horse and the heads of the car horses close together, and that the driver of the car called out to the plaintiff to come ahead, and that then both the wagon and the car moved forward, the plaintiff starting up in consequence of the request of the car driver. There was also evidence tending to show that, after the wagon and car started up, the speed of the latter was accelerated, and that if the car had remained stationary for an instant there would have been no collision. On the other hand, there was evidence tending to show that, if the car had remained stationary, the wagon could not have gone on so as to get out of the way of the car, on account of another wagon, between which and the car there was not room for the plaintiff's wagon to pass. *Held*, that the circumstances were such that the general knowledge and experience of men would not at once condemn the conduct of either the plaintiff or the car driver as careless; that the court could not say that there was no evidence tending to show negligence; and that in such cases, even if the facts are undisputed, the question whether either or both of the parties was at fault is for the jury.

TORT, for personal injuries occasioned to the plaintiff, by being thrown from the seat of a wagon, in consequence of a collision with a street car of the defendant in Boston. Trial in the Superior Court, before *Hopkins*, J., who directed a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

F. Burke, for the plaintiff.

M. F. Dickinson, Jr. & W. B. Sprout, for the defendant.

BARKER, J. When the collision between the plaintiff's wagon and the defendant's car occurred, both vehicles were in motion in opposite directions. The near hind wheel of the wagon was struck by the front dasher of the car. Both the wagon and the car were attempting to go around a corner from one street into another. There was a block of cars and wagons

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in both streets, and it was a complicated and difficult matter for either vehicle to make safe progress. It is not easy to ascertain, from the statements of the bill of exceptions, the exact situation of affairs, or just how the collision occurred. But there was evidence tending to show that, immediately before the accident, the wagon and the car were both on the corner and both stationary on account of the block, the head of the plaintiff's horse and the heads of the car horses close together, and that the driver of the car called out to the plaintiff to come ahead, and that then both the wagon and car moved forward, the plaintiff starting up in consequence of the request of the car driver. There was also evidence tending to show that, after the wagon and car started up, the speed of the latter was accelerated, and that if the car had remained stationary for an instant there would have been no collision.

On the other hand, there was evidence tending to show that, if the car had remained stationary, the wagon could not have gone on so as to get out of the way of the car, on account of another wagon between which and the car there was not room for the plaintiff's wagon to pass. There was nothing unusual either in the plaintiff's horse or wagon, or the car and its horses, and both drivers were men of experience, and both the car and the wagon were moving slowly. While we do not hold that, if the accident happened under these circumstances, the driver of the car must be necessarily found to have been negligent if a collision occurred while the plaintiff was driving forward in compliance with his request, we are of opinion that whether he was negligent in causing the collision should have been left to the jury. Both he and the plaintiff knew that the car was equipped with brakes which gave its driver the power to stop it suddenly, and that, in executing the manœuvre which the car driver had suggested, the plaintiff would be unable to see how closely the two vehicles were approaching after he had moved forward but a part of the distance necessary to clear the car, while the car driver would be in a position to see the plaintiff's wagon until it should be out of the way of the car. We see no evidence that makes it clear that the plaintiff was not in the exercise of ordinary care. It is evident that the circumstances under which the plaintiff and the car driver were both

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called upon to act were complicated, and we cannot see that the general knowledge and experience of men at once condemn the conduct of either as careless, nor can we say that there is no evidence tending to show negligence. In such cases, even if the facts are undisputed, the question whether either or both of the parties were at fault is for the jury. *Fletcher* v. *Boston & Maine Railroad*, 1 Allen, 9, 15. *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208, 212. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137, 143. *Lane* v. *Atlantic Works*, 107 Mass. 104.

Exceptions sustained.

HAMILTON A. HILL & others *vs.* GEORGE G. McLAUGHLIN.

Suffolk. January 20, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Replevin — Memorandum of Sale — Single Contract and one and indivisible Promise — Appropriation of Payments.

In the case of payments made upon a contract of conditional sale, there was no appropriation by either of the parties, and nothing which required or justified an appropriation by the court to any one of the articles more than to all of the others. The articles were all bought at one time under a single contract, and the promise to pay for them was one and indivisible. The question was whether the payments should be appropriated to the articles which appeared first in the paper, or to all of them. *Held*, that the payments were made on the contract, and were applicable to the sum due upon it, and not to any part of that sum, nor with any reference to the way in which the aggregate was made up.

REPLEVIN of certain articles of machinery sold by the plaintiffs to the defendant, upon a contract which recited that the defendant had received of the plaintiffs the articles, a list of which was annexed, and that, if the price set against them was paid as per memorandum in the margin, they were to belong to the defendant, otherwise to remain the property of the plaintiffs. At the trial in the Superior Court, before *Thompson*, J., there was evidence tending to show that the defendant had returned to the plaintiffs two items upon the contract, so that there remained in the defendant's possession at the time of the taking under the writ, one Fifield lathe, opposite which was set the

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price of $475, and one Prentice drill, opposite which was set the price of $468. The defendant offered uncontradicted evidence tending to show that money, and merchandise accepted as money, had been paid to the plaintiffs upon the contract before the date of the writ, and before the time of the seizure, sufficient to cover the sum of $475, and whatever costs and interest there may have been upon the same, which $475 was the price of the Fifield lathe. There was no evidence tending to show that any application of the moneys paid by the defendant to the plaintiffs had been made by either party.

The defendant asked the judge to rule, that, in case sufficient money was paid under the contract by the defendant to the plaintiffs before the bringing of the writ to pay for the first article in the contract, then the money under and by virtue of the terms of the contract should be applied to the payment of such article, and that at the time of the completion of the payment of a sufficient sum of money to them for the payment of the article, that that article then, under the terms of the contract, became the property of the defendant; and that the plaintiffs had no right thereto, and that the same was unlawfully replevied. The judge refused so to rule, and rendered judgment for the plaintiffs; and the defendant alleged exceptions.

H. L. Baker, for the defendant.

C. H. Sprague, for the plaintiffs.

KNOWLTON, J. The parties agree that the plaintiffs can maintain their action unless the Fifield lathe was paid for by the defendant. This lathe was delivered to the defendant at the same time and under the same contract as several other articles of personal property. The contract was in writing, and was in substance a conditional sale, which provided that the title should remain in the plaintiffs until the goods were paid for, and that the plaintiffs might enter and remove the property if payment was not made in accordance with the agreement. The names of the different articles were written one after another in the contract, with the price of each set against it in the margin, and the several prices added together, and the aggregate written at the bottom. Payments have been made amounting to more than the price of the Fifield lathe, and of the other articles which stood before it in the contract, but not to so much as the

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sum to be paid for the whole. No appropriation of these payments has been made by either of the parties. The question is whether they shall be appropriated to the articles which appear first in the paper, or to all of them.

In the absence of any appropriation by either of the parties, there is nothing in the case which requires or justifies an appropriation by the court to any one of the articles more than to all of the others. They were all bought at one time under a single contract. The promise to pay for them was one and indivisible. The payments were made on that contract, and were applicable to the sum due upon it, and not to any part of that sum, nor with any reference to the way in which the aggregate was made up. *Crompton* v. *Pratt*, 105 Mass. 255. *Swett* v. *Boyce*, 134 Mass 381. The ruling requested was rightly refused.

Exceptions overruled.

RICHARD RIGG, administrator, *vs.* BOSTON, REVERE BEACH, AND LYNN RAILROAD COMPANY.

Suffolk. January 27, 1893. — March 2, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Negligence — Evidence — Invitation to cross Railroad Track — Verdict — View by Jury.

If a person, knowing the approach of a railroad train at speed, unnecessarily stands so near the track that the common sense of mankind must condemn his act as a want of ordinary care, he cannot recover for personal injuries occasioned by being struck by the train, even if it is assumed that the defendant corporation held out an invitation to the plaintiff to cross the track at the point where he was injured; and experiments made shortly after the accident by putting a stick in the ground near the track when another train was passing are immaterial.

The presiding justice may properly rule upon the effect of the evidence and direct a verdict, notwithstanding the fact that the jury have taken a view, if nothing occurred at the view to show that his ruling was wrong.

TORT, for personal injuries to the plaintiff's intestate, alleged to have been caused by the defendant's negligence.

At the trial in the Superior Court, before *Thompson*, J., there was evidence tending to show that the defendant had built on

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the easterly side of its track, and upon its land between Oak Island and Crescent Beach, two stations on the line of its road between Boston and Lynn, a plank walk over one thousand feet in length for travellers and those who frequented the beaches to walk upon, and that the southerly end of the walk abutted upon another short plank walk, running from a point one foot distant from the easterly rail of the defendant's track to a bath-house lying east of the first walk; that there was a railing upon each side of the first walk, and upon both sides of the short walk down to a point five feet and half an inch distant from the easterly rail of the defendant's track, the railing of each walk uniting, and that the only convenient way of getting off the first walk was by passing from the first to and upon the second walk, and off that end of the second walk which was next to the rails of the defendant's track; and that people were accustomed to walk down the said walk built by the defendant, go upon the second walk, and cross over the defendant's track to the buildings lying on the westerly side of the same. There was no evidence that the short walk was constructed by the railroad.

The plaintiff offered evidence tending to show that, on June 27, 1889, the intestate started at about nine o'clock P. M. from Oak Island to go to Crescent Beach, where he was to take a train to Boston in company with three other persons, and in doing so walked down the first named plank walk, and turned on to the short walk to pass over the track to the station, which was on the westerly side of the same, near Revere Street, and that when they reached that point on the short walk where the railing ends, they saw an express train coming from Boston and going towards Lynn, which train was then about two hundred feet away, and moving at about the rate of thirty miles an hour, and that they stopped abreast of the post which supports the end of the railing, and the plaintiff's intestate stood there with a small portion of his body in front of the post, and a portion of his body abreast of and behind the same, while the train passed by. It appeared that some two or three hundred feet southerly from where the plaintiff's intestate stood there was a curve in the defendant's track, so that the train just before reaching said point was caused to go in a more easterly direc-

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tion, that the engine and two or three cars of the train passed the plaintiff's intestate, and that the steps of the next car struck him, causing injuries from which he afterwards died. The distance from the post where the plaintiff's intestate stood to the nearest rail of the defendant's track was five feet and one half-inch; the side of the defendant's cars extended outwards from the rail of the track a distance of three feet.

There was evidence tending to show that the steps of the defendant's cars extended outward beyond the side of the cars a few inches, varying from one and a half inches to three or four inches, and that the steps of the cars upon other roads did not extend outward beyond the sides of the same. The plaintiff offered evidence tending to show that one of the witnesses for the plaintiff, shortly after the accident, put a stick firmly in the space between the third and fourth planks from the defendant's track upon the short platform, when a train passed by in the same direction as the one which caused the accident, and that the engine and two cars of the train passed by without disturbing the stick; but that the steps of the car next following struck the same and broke it. The judge excluded the evidence so offered, and the plaintiff excepted.

After the jury were impanelled, they were taken to the place where the accident occurred, and took a view of the location and premises, made measurements of such distances as they desired, saw some of the defendant's cars, and took measurements of the distances to which the steps of the cars extended outward beyond the sides of the cars, and stood nearly on the spot where the testimony showed the plaintiff's intestate stood when the accident happened, and saw an express train going from Boston to Lynn pass by that point. There was no evidence that the cars they saw, and the steps they measured, and the train which passed, were the same which caused the accident; but neither party made any objection to the action of the jury. After the plaintiff had rested his case, the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

W. B. Orcutt & E. J. Jenkins, for the plaintiff.

M. O. Adams, for the defendant.

BARKER, J. If the plaintiff's intestate, while walking from Oak Island to Crescent Beach upon the defendant's land, was not

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a mere licensee, his invitation was such as to make it incumbent on himself to keep out of the way of trains. The making of a long plank walk with railings for the use of visitors to the beach on the side of the railroad next the sea was not an invitation to the exclusive use of any other part of the defendant's location, and gave visitors no right to expect that the track would not be used for the passage of trains. Assuming that because the cross walk was on the defendant's land, and was connected with one end of the defendant's walk, it was an invitation to cross the track at that point, it held out no inducement that the crossing was free from danger. Those who were impliedly invited by its existence to cross the rails at that point were only invited to do so taking upon themselves the obvious risk of the use of the track for the moving of trains. And if the side rails of the cross walk were an invitation to stand within the space marked by them while awaiting the passage of a train, they were not an invitation to stand with a portion of the person outside that space, which is what the plaintiff's intestate did, while, if he had kept within the space which the invitation authorized him to occupy, he would have been safe from injury by the train. Indeed, the exceptions show that, as the distance between the track and the post at the nearer end of the railing was five feet and one half-inch, and the extreme projection of the car step from the track toward the post was only three feet and four inches, the deceased to have been touched by the train must have so placed himself that the part of his body struck was twenty and one half inches beyond the post, and this is more than the thickness of the body of a man of usual size. Besides this, the curve of the track and the direction of the train were such that, if there was any lateral swing, it would tend to throw the cars farther from the post than if they had been stationary. The deceased and his companions saw the train when it was two hundred feet away, and waited for it to pass. There was time for a movement backward, and no crowd of persons, or anything to prevent such a movement, and no exigency for him to stand where, with the train approaching at such a high rate of speed, he was obviously exposed to danger. Upon the evidence, knowing the approach of the train at speed, he unnecessarily stood so near the track that the common sense

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of mankind must at once condemn his act as a want of ordinary care.

Experiments tried shortly after the accident were immaterial in the view of the case which we adopt. The presiding justice might properly rule upon the effect of the evidence, and direct a verdict, notwithstanding the fact that the jury had taken a view; *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, 503; and we see nothing in the statement of what occurred at the view to show that his ruling was wrong. *Exceptions overruled.*

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY *vs.* JENNIE C. I. MARTIN.

Hampden. September 28, 1892. — March 8, 1893.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Attorney and Client — Executory Agreement to settle Suit under Mistake of Fact — Specific Enforcement in Equity — Election of Remedies.

An executory agreement for a settlement of a suit for personal injuries, which was not made of record in the case, and was in fact made by an attorney at law under a mistake of fact as to his authority, cannot be specifically enforced in equity against his client.

When equitable matter can be used as a defence to an action under the St. of 1883, c. 223, § 14, or as the foundation of a suit in equity to enjoin the prosecution of an action, although a party can elect whether he will proceed in one way or the other, after he has elected to proceed in one way and has taken the opinion of the court upon the merits of the proceeding, he ought not, without good cause shown, to be permitted to abandon that, and to avail himself of the chance of obtaining a more favorable decision by a separate proceeding before another tribunal.

FIELD, C. J. This is a novel attempt in this Commonwealth. Miss Martin brought suit against the railroad company on April 21, 1890, in the Superior Court for the County of Hampshire; the company appeared and pleaded in abatement that neither the plaintiff nor the defendant lived or had a usual place of business in said county, but that the company had its usual place of business in the county of Hampden; whereupon, on motion of the plaintiff, the cause was transferred to the Superior

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Court for the County of Hampden, under Pub. Sts. c. 161, § 12. The defendant also filed a petition for the removal of the cause to the Circuit Court of the United States for the District of Massachusetts, under the statutes of the United States, and this was transmitted with the other papers to the Superior Court for the County of Hampden, and the petition was granted by that court, and the cause entered in said Circuit Court at the October term, 1890. In the summer of 1891 there were negotiations for a settlement between counsel. The settlement, if one was agreed upon, was repudiated by Miss Martin, and this was made known to the counsel for the defendant by the letter of her counsel dated October 10, 1891. The company filed in the Circuit Court an additional answer, setting up the alleged settlement in bar of the action. On February 9, 1892, the counsel for the company suggested to the Circuit Court that it had no jurisdiction, and asked that the cause be remanded to the Superior Court for the County of Hampden. The counsel for Miss Martin contended that it should not be so remanded; but the Circuit Court, after hearing the parties, remanded it to the Superior Court for the County of Hampden. The company gave notice of an appeal from this decision, presented a draft of exceptions to the ruling, and claimed a writ of error; but the Circuit Court refused the writ of error, disallowed the exceptions, and dismissed the appeal. The record was then filed in the Superior Court for the County of Hampden, and Miss Martin claimed a trial by jury, on March 7, 1892, and the case was put on the trial list for the March term, 1892. The company contended before Mr. Justice Dewey, the justice holding the term, that the case had been improperly remanded from the Circuit Court, and that it was in fact pending in that court, and also that the alleged agreement for a settlement was a legal and equitable bar to the prosecution of the action; and it filed an additional answer, setting up substantially the same facts as are alleged in the present bill in equity, and an arrangement was made "by which these questions were brought by counsel of both parties to the attention of Mr. Justice Dewey, on March 19, 1892, before the case was reached for trial by jury." Mr. Justice Dewey heard the parties on these preliminary questions, and made a memorandum of his opinion, which was shown to coun-

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sel. It appears from this memorandum that he held that the case was rightly in the Superior Court for the County of Hampden, and that the alleged compromise could not be treated as a legal or equitable bar to the prosecution of the action. Instead of having this decision made in some form a matter of record, and of taking exceptions to the rulings of law contained in it, the railroad company thereupon brought this bill in equity in this court, praying for a specific performance of the alleged agreement of settlement, and that Miss Martin be enjoined from the further prosecution of her suit in the Superior Court. This suit in equity was tried by a justice of this court at the time when the Superior Court for the County of Hampden was holding its June sitting, and was reported to the full court. It is plain, we think, that, if the agreement has the effect the counsel of the railroad company attributes to it, it is an accord without satisfaction, and therefore is not a legal bar to the prosecution of the action. It is also plain, we think, that, if this bill can be maintained, the same facts would be a good equitable defence under St. 1883, c. 223, § 14, and that, having been pleaded as an equitable defence in the action at law, and this defence having been actually heard in that action, the decision should have been made a matter of record; and if the defendant was aggrieved thereby, it should have been allowed to file exceptions. When equitable matter can be used as a defence to an action under St. 1883, c. 223, § 14, or as the foundation of a suit in equity to enjoin the prosecution of an action, although a party can elect whether he will proceed in one way or the other, after he has elected to proceed in one way, and has taken the opinion of the court upon the merits of the proceeding, he ought not, without good cause shown, to be permitted to abandon that, and to avail himself of the chance of obtaining a more favorable decision by a separate proceeding before another tribunal. We think it not improbable that Mr. Justice Dewey expected that, after making known to the counsel the contents of his memorandum, the case would be tried by a jury, and that if the plaintiff prevailed, and the defendant was not satisfied with the result, his finding and decision on the preliminary hearing would be made a matter of record and of exception. As they are not a matter of record

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in the action at law, the questions are not in any sense *res judicata*, and we must consider the present suit on its merits. We think that it appears, from the correspondence of the counsel of the parties, that the counsel of the company offered $6,500 for a full release and discharge from Miss Martin and her father, and that he was not willing to pay the money until he had "proper releases of plaintiff and collateral claims." What the father's claim for "expenses, loss of service," etc. was, we do not know, but it may have been considerable. The counsel for the company insisted upon having the personal release of the father as well as of the daughter, and he doubted whether the counsel for Miss Martin could give a valid release for the father. Certainly, merely as attorney for Miss Martin, he could not. The counsel for Miss Martin apparently was willing to get the release from the father as well as from Miss Martin if he could, but it seems that he never agreed to obtain a release of the father's claim. We think that it appears that the minds of the counsel never actually met upon all the terms of the agreement, and that the counsel of the company knew that the counsel of Miss Martin had never actually agreed to obtain a release from the father as a part of the consideration of its promise to pay $6,500. We think, also, that it appears that the statement of the counsel of Miss Martin in the letter of September 5, 1891, as follows, "I am authorized to settle for the $6,500, somewhat to my surprise," was made under a mistake of fact. The counsel was not in fact acting under his general authority as attorney, but under the authority given by the father, who purported to act for his daughter, but the daughter had not given to the father authority to make such a settlement. We have been shown no case where an executory agreement for a settlement of a suit for personal injuries, which was not made of record in the case, and was in fact made by an attorney at law under a mistake of fact as to his authority, has ever been specifically enforced in equity against his client. Agreements for the compromise of suits are sometimes specifically enforced in England by a motion or petition in the cause or by a bill in equity, but we have seen no case like the present. See *Pryer* v. *Gribble*, L. R. 10 Ch. 534; *Holt* v. *Jesse*, 3 Ch. D. 177; *Attwood* v. ——, 1 Russ. 353; *Dawson* v. *Newsome*, 2 Giff. 272; *Richardson* v.

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Eyton, 2 DeG., M. & G. 79; *Eden* v. *Naish*, 7 Ch. D. 781; *Scully* v. *Dundonald*, 8 Ch. D. 658; *Swinfen* v. *Swinfen*, 2 DeG. & J. 381; *Green* v. *Crockett*, 34 L. J. Ch. 606; Fry on Spec. Perf. (3d Eng. ed.) §§ 1578–1585. We desire to express no opinion upon the question whether an attorney at law, by virtue of his employment, has authority to agree to a compromise of his client's suit out of court. If such compromise is entered of record in the suit and relates to the disposition to be made of the suit, as, for example, an agreement for the amount of the judgment, it may be that it binds the parties to that suit, unless the court for good cause shown consents to the withdrawal of the agreement, and that, if it has been made without authority, or improperly made, the attorney is answerable in damages to his client. In *Wieland* v. *White*, 109 Mass. 392, it was said that "accordingly it has been held that a general authority to an attorney to conduct a cause implies an authority to compromise in good faith and in a reasonable manner, if there is no express prohibition," and the English cases are cited as authority; but in *Wieland* v. *White* the agreement considered was that the defendant in the process of forcible entry and detainer should be defaulted, and that execution should not be taken out until some days after the default. This clearly related to the conduct of the suit. In *Moulton* v. *Bowker*, 115 Mass. 36, it is said that "an attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action; and we can have no doubt that this includes the power to release an attachment, at least before judgment, which is all that this case requires us to consider."

It seems that the weight of authority in this country is that an attorney employed in the usual way to bring and conduct a suit is not by virtue of his employment invested with authority to compromise the suit out of court without the sanction of his client, although, if the agreement is carried into effect and the suit disposed of by proper entries in court, the agreement may be allowed to stand and the client left to his action against the attorney. In England, it seems that a compromise entered into by a barrister *bona fide*, and not made in defiance of the client's instructions, will be upheld if it be found

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to be reasonable. The authorities are collected in Weeks on Attorneys at Law, § 228 *et seq.* We do not deem it necessary, however, to decide in this case what the rule in this Commonwealth is. We know of no precedents in this Commonwealth for enforcing in equity an executory agreement of the kind alleged to have been made in this case, and if, under some circumstances, such a remedy is to be given, we think it appears that the present agreement was made under such a mistake of fact as would prevent equitable relief, even if counsel had exactly agreed upon the terms. It is apparent that the attorney of the company did not rely wholly upon the authority of the attorney of Miss Martin, because he required her personal release.

Bill dismissed.

G. M. Stearns, for the plaintiff.

A. A. Strout & W. H. Coolidge, (*W. G. Bassett & W. R. Bigelow* with them,) for the defendant.

MATILDA CONROY *vs.* INHABITANTS OF CLINTON.

Worcester. October 7, 1892. — March 8, 1893.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Employers' Liability Act — Loss of Life — Action — Negligence — Election between Counts.

Whether an action for the death of a person occasioned, while employed in a sewer trench in process of construction by a town, by the caving in of the walls of the trench, comes within the St. of 1887, c. 270, § 1, cl. 1, as for a death caused "by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer," *quære.*

In an action under the St. of 1887, c. 270, for the death of C., occasioned while employed in a sewer trench in process of construction by a town, by the caving in of the walls of the trench, the declaration alleged that the defects "in the condition of the ways, works, or machinery . . . consisted in using decayed, rotten, unsafe, and unsuitable planks and timbers for bracing up the sides of the trench of said sewer; that the said planks and timbers used as aforesaid were placed so wide a distance apart on the sides of the trench of said sewer as to be totally inadequate and insufficient to sustain and keep in place the sides of the trench aforesaid; that at the time said C. was killed the bracing had been negligently and carelessly suffered to remain in place a long time, to wit, the space of twenty-four hours, without being tightened or fixed or made secure, and in consequence thereof had become loose, unsafe, and utterly inadequate to sustain and keep in

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place the sides of the said trench." The evidence was, that the planks and timbers used for bracing up the sides of the trench were sound, and there was an abundant supply of material furnished; that the shoring and bracing were entirely in C.'s charge; and that he was paid higher wages than the other workmen to superintend the work; and there was conflicting evidence on the point whether he himself put in the shoring and bracing at the place of the accident. The judge ruled that the plaintiff had failed to make out her case, and directed a verdict for the defendant. *Held*, that the plaintiff had no ground of exception.

In an action under the St. of 1887, c. 270, for the death of C., occasioned while employed in a sewer trench in process of construction by a town by the caving in of the walls of the trench, the first count of the declaration, based upon § 1, cl. 1, alleged certain defects in the condition of the planks and timbers used for bracing up the sides of the trench, in the mode of construction, and in not tightening the bracing on the day of the accident; and the second count, based on § 1, cl. 2, alleged that the negligence of the superintendent "consisted in directing and ordering said C. to work at the bottom" of the trench, and described the condition of the trench as in the first count. At the close of the evidence, the judge required the plaintiff to elect upon which count she would proceed; to which she excepted, and elected to proceed upon the first count. There was no evidence that the superintendent in charge of the work ordered C. to go into the trench; but the evidence was that C. went into the trench of his own motion. *Held*, that the plaintiff was not injured by being required to elect on which count she should proceed.

LATHROP, J. The plaintiff is the widow of Anthony Conroy, and brings this action, under the St. of 1887, c. 270, § 2, for his death, he being killed on November 6, 1890, while laying pipe in the bottom of a sewer trench, which was being constructed by the defendant. The immediate cause of the death was the caving in of the walls of the trench. The declaration contains four counts. The first and third are based upon clause 1 of § 1 of the St. of 1887, c. 270, and the second and fourth upon clause 2 of the same statute. The first and third differ only in this respect, that one alleges that Conroy was instantly killed, and the other that he died without conscious suffering. The same is true of the second and fourth counts.

The defects "in the condition of the ways, works, or machinery," the first count alleges, "consisted in using decayed, rotten, unsafe, and unsuitable planks and timbers for bracing up the sides of the trench of said sewer; that the said planks and timber used as aforesaid were placed so wide a distance apart on the sides of the trench of said sewer as to be totally inadequate and insufficient to sustain and keep in place the sides of the trench aforesaid; and that at the time said Conroy was killed the bracing had been negligently and carelessly suffered to remain

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in place a long time, to wit, the space of twenty-four hours, without being tightened or fixed, or made secure, and in consequence thereof had become loose, unsafe, and utterly inadequate to sustain and keep in place the sides of the said trench."

The second count alleges that the negligence of the superintendent "consisted in directing and ordering said Anthony Conroy to work at the bottom of a trench of a certain sewer," etc., and describes the condition of the trench as in the first count.

At the close of the evidence, the presiding judge required the plaintiff to elect upon which counts she would proceed, to which the plaintiff excepted. She then elected to proceed upon the first and third counts. The judge thereupon ruled that the plaintiff had failed to make out her case; and directed a verdict for the defendant. The case comes before us on the plaintiff's exceptions to these rulings and directions, and upon a report of the evidence.

It is a question not free from difficulty whether this case comes within clause 1 of § 1 of the St. of 1887, c. 270. The language is, "by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer." In *Howe* v. *Finch*, 17 Q. B. D. 187, it was held that the statute did not apply to ways or works in process of construction. In that case the plaintiff was injured by the fall of a wall of a building in process of construction, which had never been used in the defendant's business, though it was intended to be so used when finished. It was held that the case was not within the statute. A. L. Smith, J., said, after citing the language of the statute: "Does that mean partly made ways, etc., which may be very insecure when in process of construction? No. It means to give him a right of action when the contemplated ways, works, etc. are 'connected with or used in the business,' and are in a defective state by reason of the master not having discovered what he ought to have done. 'Ways' means the ways used in the business, not partly made ways not used. If that be so as to 'ways,' it is so as to 'works.' . . . I think 'ways, works,' etc. mean the existing and completed works."

In *Ashley* v. *Hart*, 147 Mass. 573, it was held that the clause under consideration did not give a right of action against the employer for the negligence of a fellow servant in handling or

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using a machine, tool, or appliance which was itself in a proper condition.

The case of *Connolly* v. *Waltham*, 156 Mass. 368, was not under § 1, cl. 1. If, however, without deciding this question, we assume that § 1, cl. 1, applies to a temporary work like that in the case at bar, we are of opinion that the ruling below was correct. There was no evidence of the using of "decayed, rotten, unsafe, and unsuitable planks and timbers for bracing up the sides of the trench." On the other hand, the evidence was that the planks and timbers were sound, and that there was an abundant supply of material furnished. The other defects alleged are in the mode of construction, and in not tightening the bracing on the day of the accident. But the evidence is that the shoring and bracing were entirely in Conroy's charge. He was paid higher wages than the other workmen to superintend the work. There is no evidence to the contrary on this point. There is, it is true, conflicting evidence on the point whether he himself put in the shoring and bracing at the place of the accident; but, as he had charge of this work, and had full opportunity before going into the trench to see its condition, the question whether he did it himself is immaterial. If there was any negligence, it was his negligence; and the defendant is not liable therefor.

The remaining question is whether the plaintiff ought to have been required to elect on which counts she should proceed. This we need not consider, as we are of opinion that she was not injured by being required to elect. The only negligence on the part of any one exercising superintendence alleged is, that Martin Kane, who had the general charge of the work, ordered Conroy to go into the trench. There is no evidence that such an order was given. On the contrary, the evidence is that Conroy went into the trench of his own motion. See *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293. There was no evidence which would have warranted the submission of this issue to the jury; and the plaintiff is not aggrieved by the ruling given. *May* v. *Whittier Machine Co.* 154 Mass. 29. *Brady* v. *Ludlow Manuf. Co.* 154 Mass. 468, 472. *Murray* v. *Knight*, 156 Mass. 518.

Exceptions overruled.

J. Smith & W. A. Gile, for the plaintiff.

W. S. B. Hopkins, (*F. B. Smith* with him,) for the defendant.

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DANIEL A. ANTHONY & another, administrators, *vs.* MASSACHUSETTS BENEFIT ASSOCIATION.

Bristol. October 24, 25, 1892. — March 3, 1893.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Beneficiary Association — Right of Member to assign Certificate — Validity of Assignment.

A beneficiary association organized under the Sts. of 1874, c. 375, and 1877, c. 204, (Pub. Sts. c. 115,) issued to A. a certificate, by the terms of which he was constituted a benefit member, and the association agreed "to pay to the heirs at law of said member," in sixty days after due proof of his death, a certain sum. One of the conditions on which the certificate was accepted was that "any assignment of this certificate shall be void unless assented to in writing by said association, but it shall not be invalidated thereby." The St. of 1882, c. 195, provides that a sister of a member may be a beneficiary. *Held*, that A. had a right to assign to his sister a part of the money payable by the terms of the certificate.

A beneficiary association organized under the Sts. of 1874, c. 375, and 1877, c. 204, (Pub. Sts. c. 115,) issued to A. a certificate, by the terms of which he was constituted a benefit member, and the association agreed "to pay to the heirs at law of said member," in sixty days after due proof of his death, a certain sum. Among the conditions on which the certificate was accepted were the following: "Any assignment of this certificate shall be void unless assented to in writing by said association, but it shall not be invalidated thereby. . . . No agent of the association is authorized to make, alter, or discharge contracts, or waive forfeitures; and any such act to be valid must be done in writing, and signed by the treasurer of the association." A rule of the association also required both the member insured and the present beneficiary to sign the form of assignment. A. assigned to his sister a part of the money payable by the terms of the certificate; and the assent of the association to the assignment was manifested by the signing of the treasurer's name by a clerk, who acted in so doing under the general authority of the treasurer. *Held*, that the assignment was valid.

CONTRACT, by the administrators of the estate of Arnold B. Sisson, to recover $5,000 upon a certificate issued by the defendant on September 28, 1883, to Sisson. Mary R. Sisson, a sister of Arnold B. Sisson, appeared as claimant of $2,000 of the fund, under an assignment by her brother to her. Trial in the Superior Court, without a jury, before *Blodgett*, J., who found for the plaintiffs in the sum of $3,000, and for the claimant in the sum of $2,000; and, at the request of the plaintiffs, reported the case for the determination of this court. The facts appear in the opinion.

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A. M. Goodspeed, for the plaintiffs.

F. A. Milliken, for the defendant.

LATHROP, J. The defendant in this case does not dispute its liability, and the only question is whether Arnold B. Sisson, to whom a certificate had been issued by the defendant in 1883, had the right to assign, in 1888, to his sister, Mary R. Sisson, a part of the money payable by the terms of the certificate.

By the terms of the certificate Arnold B. Sisson was constituted a benefit member, and the defendant agreed "to pay to the heirs at law of said member," in sixty days after due proof of his death, "a sum equal to the amount received from a death assessment, but not to exceed five thousand dollars." The certificate was accepted on several conditions, which formed part of the contract, two of which only need now be considered. These are the third and fifth. The third is as follows: "Any assignment of this certificate shall be void unless assented to in writing by said association, but it shall not be invalidated thereby." The fifth provides that "No agent of the association is authorized to make, alter, or discharge contracts, or waive forfeitures; and any such act to be valid must be done in writing, and signed by the treasurer of the association."

The plaintiffs, who seek to recover the amount of the certificate for the benefit of the heirs at law, contend that the contract is one of insurance, and that by the certificate the right to the benefit of it vested in the heirs at law of the member, without any right on his part to change it, in whole or in part, by an assignment.

The defendant was organized in 1878, under the provisions of the St. of 1874, c. 375, and the St. of 1877, c. 204 (Pub. Sts. c. 115). The St. of 1882, c. 195, having been passed before the certificate in this case was issued, is also to be considered. See *Massachusetts Catholic Order of Foresters* v. *Callahan*, 146 Mass. 391. There is nothing in these statutes which limits the right of the association and one of its members to alter, in any way they may see fit, a contract which they may have made; and, until after this action was brought, there was no by-law of the defendant upon the subject. The Pub. Sts. c. 119, § 167, do not apply. See *Haskins* v. *Kendall*, *ante*, 224. On the other hand, the third condition on which the certificate was issued clearly implies that a certificate may be assigned.

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The distinction between a policy of insurance and a certificate of a beneficiary association was pointed out by Mr. Justice Devens, in *Marsh* v. *American Legion of Honor*, 149 Mass. 512, 515; and it was said: "All that a beneficiary has during the lifetime of the member who holds the certificate is a mere expectancy, which gives no vested right in the anticipated benefit, and is not property, as, owing to his right of revocation, it is dependent on the will and pleasure of the holder." Under our decisions, the assignment must be to one of a class for whom the association may provide. Under the St. of 1882, c. 195, a sister of a member may be a beneficiary.

The views above set forth are sustained by many authorities. See *Supreme Conclave* v. *Cappella*, 41 Fed. Rep. 1; *Masonic Benefit Society of Indiana* v. *Burkhart*, 110 Ind. 189; *Milner* v. *Bowman*, 119 Ind. 448; *Martin* v. *Stubbings*, 126 Ill. 387, 404; *Barton* v. *Provident Relief Association*, 63 N. H. 535; *Knights of Honor* v. *Watson*, 64 N. H. 517.

The remaining question relates to the manner in which the assignment was assented to. The fifth condition, requiring an alteration of a contract to be in writing and signed by the treasurer, and the rule of the association requiring both the member insured and the present beneficiary to sign the form of assignment, we regard as merely regulations framed for the protection of the association, which it may dispense with if it sees fit. See *Supreme Conclave* v. *Cappella*, 41 Fed. Rep. 1, 4, and cases cited. If the original beneficiaries had not a vested interest in the certificate, the member could assign it without their assent. The assent of the association was sufficiently manifested by the signing of the treasurer's name by a clerk, who acted in so doing under the general authority of the treasurer.

As we find no error in the rulings of the justice who presided in the Superior Court, judgment is to be entered on his finding.

So ordered.

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SARAH A. B. SNOW & others *vs.* BOSTON BLANK BOOK MANUFACTURING COMPANY & others.

Middlesex. December 7, 1892. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Supplemental Report of Facts — Fraud — Laches.

The principal and latest transaction which the plaintiff shareholders of a corporation sought in equity to set aside was a sale on July 17, 1888, by the defendant corporation, to two defendant shareholders. The bill was filed on October 9, 1889. The number of shareholders was small, their relations to each other were such that the business of the corporation was in a general way known to all, the action of the two defendant shareholders was open and unconcealed, and no stockholder made objection to their participation in formal action for the corporation in transactions with themselves until after innocent third persons had acquired rights in the property and the two defendant shareholders had incurred new obligations with reference thereto. *Held*, that the inference of laches was justified.

BILL IN EQUITY by a shareholder for herself and other shareholders against the corporation and certain other shareholders, praying for relief and an account because of the fraud of the defendant shareholders and their action as directors and otherwise for the corporation in its transactions with themselves.

According to the former decision, reported 153 Mass. 456, the case was sent back in order that there might be inserted in the report a statement of the facts and circumstances upon which the finding of laches rested. The supplemental report of facts was by *Mason*, C. J., and was as follows:

"The cause was heard at the equity session in Suffolk; neither party requested a report of the evidence under rule thirty-five, nor was such report directed by the justice. It appeared that the defendant corporation was organized to conduct the business theretofore owned and conducted by the defendants Lyman and White, and the purchase made from Lyman and White was intended from the outset and known to all concerned; that Frank H. Little, one of the plaintiffs, was the active promoter of the corporation, prominent in its management and conversant with the details of its transactions with Lyman and White; that the number of stockholders was small, and their relations to one another such that the business of the corporation

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was in a general way known to all; and that the action of Lyman and White in behalf of the corporation, in the formalities connected with the original sale to and the final purchase from the corporation, was open and unconcealed, — all the particulars of the record were accessible to all the plaintiffs who chose to examine it. No stockholder made objection to the participation of Lyman and White in formal action for the corporation in transactions with themselves until after innocent third parties had acquired rights in the property in question, and Lyman and White had incurred new obligations with reference thereto, and a long time had elapsed thereafter, when the plaintiffs, having come to believe that Lyman and White had been guilty of fraud in the sale to and in the purchase from said corporation, instituted this action.

"The evidence and the contention of parties related mainly to the alleged fraud, although the plaintiffs incidentally contended that, if fraud were not established, they were entitled to relief and to an account, because of the said action of Lyman and White as directors and otherwise for the corporation in its transactions with themselves. The question of laches was discussed by counsel as a single question. There was no request for a finding upon any specific fact or facts, nor any request for ruling that any specific fact or group of facts did or did not constitute laches, except the ruling requested by the defendants upon the whole evidence, which was not given.

"The hearing was concluded, June 3, 1890, and the decision reserved. The question of laches with reference to actual fraud, as alleged in the bill, was a very different one from that remaining after the finding upon the question of fraud. There was conflict of evidence upon the part of the case eliminated by that finding, which made it impossible to rule that laches appeared as matter of law upon every possible view of the facts. There was no request for ruling upon the portion of the case remaining after that finding, nor was any such ruling made. Laches with reference to the action of Lyman and White for the corporation in its transactions with themselves was considered as presented by counsel as one question. No separate elements of law or fact were formulated beyond those stated in the former report of facts found, nor in the mental process by which the conclusion

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was reached was there any conscious analysis by which subsidiary facts or principles of law involved or comprised in the general fact of laches were separately determined. Had the evidence carried the mind less readily to the finding of laches on this branch of the case, the finding would doubtless have been subjected to analysis which was not made, and the result of which did not exist as facts found at the time of the plaintiffs' request for report thereof.

"A memorandum order for dismissal of the bill, with costs, was filed July 15, 1890. By reason of delay of the defendants' solicitor to draw the decree, under rule thirty-seven, the formal decree was not entered till August 13, 1890, and the plaintiffs' request for report of facts was filed the same day, nearly thirty days after the actual decision.

"After the rescript was filed, the papers are first presented with request for this supplemental report, December 22, 1891, and if it were now legally competent to make finding of subsidiary facts not heretofore made, the minutes of testimony taken and the recollection of what appeared in evidence are not sufficient for such findings with safety to the rights of the parties, nor is the rescript understood to suggest such further findings."

A. F. Means, for the plaintiffs.

C. A. Drew, for the defendants.

ALLEN, J. When this case was before presented, (153 Mass. 456,) it seemed to us that, although the plaintiffs had not put themselves technically in proper position to save the question which they wished to argue, yet they should not lose their rights on this account, and that a statement of the facts and circumstances upon which the finding of laches rested should be given. Such supplemental report has accordingly been filed, which is as full and complete as was found possible at the late time when it was applied for; and it is sufficient to show that the general finding of laches was well warranted. The principal and latest transaction which the plaintiffs sought to set aside was the sale by the defendant corporation to Lyman and White. Though the date of this sale is not given in the report, the defendant's answer avers that it was on July 17, 1888, and no suggestion has been made that this date was wrong. The plaintiffs' former brief went on the assumption that it was right. The bill

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was filed on October 9, 1889, the plaintiffs having come to believe that Lyman and White had been guilty of fraud. The case was tried principally on the question of fraud, although the plaintiffs incidentally contended that, even if fraud were not established, they were entitled to relief, because of the action of Lyman and White as directors and otherwise for the corporation in its transactions with themselves. By the finding, actual fraud was negatived; and, actual fraud being out of the case, it was found that as to all of the plaintiffs there was laches. It now appears that the number of stockholders was small; that their relations to one another were such that the business of the corporation was in a general way known to all; that the action of Lyman and White was open and unconcealed; and that no stockholder made objection to their participation in formal action for the corporation in transactions with themselves, until after innocent third persons had acquired rights in the property, and Lyman and White had incurred new obligations with reference thereto. From these facts laches might be inferred.

Decree affirmed.

JOHN MERRILL *vs.* EDWIN D. KAULBACK.

Middlesex. December 8, 1892. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Poor Debtor — Recognizance — Amended Record — Sufficiency of Notice.

A court has power to amend its record, even after the lapse of a long time, and the record as amended imports absolute verity.

A judgment debtor delivered himself up for examination before the court, as required by his recognizance. The amended record showed that Monday was the time appointed for the examination under St. of 1888, c. 419, § 7, but by inadvertence the notice gave the time as Sunday. When the mistake was discovered, a later day was appointed and a new notice was served. It was contended that the second notice was invalid, under Pub. Sts. c. 162, § 83, because it was issued on Monday, only two days after the issuing of the first one. *Held*, in an action on the recognizance against the surety, that there was no breach thereof, and that the judgment debtor was lawfully discharged.

CONTRACT, on a recognizance wherein the defendant's obligation was that the judgment debtor, John P. Jackson, should

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within thirty days deliver himself up for examination before some court of record, or police, district, or municipal court, or trial justice, giving notice of the time and place thereof, and appear at the time fixed for his examination, and from time to time until the same is concluded, and not depart without leave of the court or magistrate, making no default at any time fixed for his examination, and abide the final order of the court or magistrate.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, the material portions of which appear in the opinion.

J. W. Low, for the plaintiff.

W. E. Rogers, for the defendant.

KNOWLTON, J. The judgment debtor delivered himself up for examination before the court, in compliance with the requirements of his recognizance, and the question in dispute is whether there was a breach of the recognizance in his failure to appear before the court on Sunday and have the case continued, or in the issuing of a new notice on the next Monday, and the subsequent proceedings.

The court had power to amend its record, even after the lapse of a long time, and the record as amended imports absolute verity. *Balch* v. *Shaw*, 7 Cush. 282. *Parker* v. *Warren*, 2 Allen, 187. *Lincoln* v. *Cook*, 124 Mass. 383.

By the Pub. Sts. c. 162, § 31, and by the amendment thereof, St. 1888, c. 419, § 7, the court or magistrate is required to "appoint a time and place for his [the debtor's] examination," and to "issue a notice thereof to the plaintiff or creditor." The appointment of the time and place is the first substantive act of the court, and, that having been done, "notice thereof" is issued. The amended record shows that Monday was the time appointed for the examination, but by inadvertence the notice gave the time as Sunday. When the mistake was discovered, a later day was appointed for the examination, and a new notice was served.

By the Pub. Sts. c. 162, § 33, it is provided that, "when a defendant or debtor has given notice of his desire to take the oath for the relief of poor debtors," no new notice shall be

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given until the expiration of seven days, "unless the former notice was insufficient in form or service," and it is contended that the second notice in this case was invalid, because it was issued only two days after the issuing of the first one. The first notice did not conform to the order of the court. It stated a time which had not been appointed. It was not the notice which the court directed, and was as if no notice had been given. It was insufficient in form, inasmuch as in form it was incorrect and worthless. The purpose of the Legislature was evidently to prevent a person who has given one good and sufficient notice from abandoning the proceedings, and giving another before the expiration of seven days from the service of the first; and the statute permitting the issuing of a second notice immediately should be held to apply to any case where the first was invalid and insufficient. The word "form" is not used in this section in a narrow sense, but includes everything that goes to the validity of the notice. The case is covered by the decision in *Burt* v. *Geary*, 128 Mass. 404. The second notice was properly issued, and the judgment debtor was lawfully discharged. *Judgment affirmed.*

GERTRUDE P. SHEFFIELD & another *vs.* HORATIO G. PARKER & another, executors.

HORATIO G. PARKER & another, executors, *vs.* GERTRUDE P. SHEFFIELD & another.

Middlesex. December 9, 1892. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Finding of Judge — Executor's Account — Appropriation to Trust Fund — Interest — Maintenance — Commissions — Probate Appeal.

The findings of a single justice of this court sitting in equity, upon questions of fact, will be sustained by the full court upon a report of the case, unless they are clearly erroneous.

A., by his will, authorized and directed his executors to set apart a certain sum from his general estate and invest it for the benefit of his son E., during his life, the fund to be paid over at E.'s death to his lineal descendants, or, if he should leave no descendants, to the trustees of a certain college. The executors, in 1877, invested a smaller sum in the stock of a certain trust company which they

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testified they intended as an investment for this trust. In 1878, a letter from the secretary of the company which mentioned the issuing of a certificate, referred to the subscription as made by "the estate of A." The certificate under which they held the stock was in the name of "B. and C., executors of the will of A.," with no other reference to the trust. Neither of the executors, until 1890, informed E. or any one else that the stock was held as part of the trust fund. A statement of account made by one of the executors in 1882 treated the whole amount of the legacy which was to constitute the trust fund as a liability against the estate, and included the stock subscribed for among the general assets of the estate, and put upon it a certain valuation per share. Until the making of the probate account there was never anything on the books of the executors, either in their accounts with E. or elsewhere, to identify the investment as made on account of the trust fund; and in a conversation one of the executors offered to convey to E. and his sister, the testator's other child, interested as a legatee under the will, other stock which belonged to the executors to make good a loss from this investment. *Held*, that there was evidence which well warranted the finding that the executors had failed to sustain the burden of proving an appropriation of the stock to the trust for the benefit of E. and his descendants.

A testator devised certain lands to his executors, in trust to sell and pay over a certain sum from the proceeds thereof to a college; the surplus, if any, over said sum he gave to his children. The executors sold the land and before making payment to the college lent the proceeds on interest. *Held*, that the interest earned by said proceeds belonged, after settlement with the college, wholly to the children.

A testator, by his will, gave to his executors all debts due to him, and all his lands in certain States, in trust, "to collect the debts, and to sell any of the lands as fast as may be necessary for the payment of my debts, and the suitable maintenance of my family until my debts are paid, with the expense of executing this trust to that time." *Held*, that the executors were not required to furnish maintenance to the testator's two children after the expiration of more than nine years from his death, although some debts of the testator were still unpaid, and after the family had been broken up by the residence of his son for nearly two years at one time in a foreign country, and the marriage of his daughter, and the death of her husband, and the subsequent death of her mother, even though the mother until her death, and the daughter during the whole of this time, had continued to live in the homestead, and though the son and daughter were again both occupying the homestead; and that the fact that the executors had made payments to the son and daughter as and for such maintenance after the expiration of said nine years, did not preclude the executors from charging such payments in their probate account against the other interests of said son and daughter in the estate.

Upon an appeal from a decree of the Probate Court on an executor's account, this court will not consider the question whether commissions for services in the management and sale of certain land shall be charged against the proceeds of the land, or against a general fund in the executor's hands for administration under a clause of the will, which provides, after payment of debts, for payment of pecuniary legacies, the form of the account giving to the legatees no notice of such a question.

TWO APPEALS, the first by the children, and the second by the executors of the will, of Joel Parker, from a decree of the

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Probate Court, dated September 9, 1890, upon the first account of the executors. The cases were heard together by *Holmes*, J., and, at the request of the executors, reported by him for the consideration of the full court. The facts material to the points decided appear in the opinion.

S. Hoar, (*W. Sullivan* with him,) for the executors.

L. S. Dabney, for Gertrude P. Sheffield and Edmund M. Parker.

KNOWLTON, J. This case comes before us on a report containing findings of fact of a single justice, and the evidence taken at the hearing. So far as the decision depends on the findings of fact, the conclusions of the single justice must be sustained, unless they are clearly erroneous. *Francis* v. *Daley*, 150 Mass. 381.

The most important question involved is whether the executors can be allowed in their account for an investment of $10,000 in the stock of the Equitable Trust Company, which they made in their names as executors. They were authorized and directed to set apart the sum of $12,000 from the general estate of the testator, and invest it for the benefit of his son, Edmund M. Parker, during his life, the fund to be paid over at his death to his lineal descendants, or, if he should leave no descendants, to the trustees of Dartmouth College. They were also authorized, under certain contingencies, to sell the testator's homestead, and invest and hold the proceeds as a trust fund. This sale, however, has not been made. The executors contend that their investment in the stock referred to was made for Edmund M. Parker, and that the stock has been held by them ever since as a part of the trust fund of $12,000 which it was their duty to create. The evidence produced failed to prove, to the satisfaction of the judge who heard it, that at the time of the purchase the stock was appropriated to this trust "in such a sense as to give Edmund M. Parker the right at and from that moment to have it accounted for as his, or to prevent them from making a different disposition of it thereafter, if for any reason they should be so minded." There is no evidence to show the subsequent appropriation of it to this trust, until after it had so far depreciated in value as to deprive them of the right so to appropriate it. It was conceded that they had no right to make such an investment for the general purposes of the estate, and the justice therefore found that the decree of the Probate Court

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was correct in disallowing this item in their account. The issue is narrowed to the simple question whether the judge should have found an appropriation to this trust by the executors when they took the stock.

It was held in *Miller* v. *Congdon*, 14 Gray, 114, and in *Collins* v. *Collins*, 140 Mass. 502, 506, 507, that, when a trust fund is to be created by an executor out of the assets of an estate, something more must be done by the executor in order to impress the trust on particular property than to hold the property with an intention that it shall constitute the trust fund. There must be some act of appropriation which transfers it to the trust fund and gives the beneficiaries the right to have it held for them. Doubtless the purchase of property by itself expressly to be held under the trust would be a sufficient act of appropriation; and there was evidence in this case from which a finding might have been made in favor of the executors. On the other hand, there was evidence which, without any imputation on the honesty or good faith of the executors, well warranted the finding that they had failed to sustain the burden of proving an appropriation of the stock to this trust. In the first place, the letter of February 27, 1878, from H. R. Bond, secretary, to the executors, which mentions the issuing of a certificate, refers to the subscription as made by "the estate of Joel Parker"; the certificate under which they held the stock was in the name of "Horatio G. Parker and Francis J. Parker, executors of will of Joel Parker," with no reference to the trust; the evidence tends to show that not until January, 1890, nearly twelve years after the stock was subscribed for, did either of the executors inform Edmund M. Parker, or any one else, that the stock was held as part of the trust fund; a statement of account made by one of the executors in 1882 treated the legacy of $12,000 which was to constitute the trust fund as a liability against the estate, and included the stock subscribed for among the assets of the estate, and put upon it the valuation of $60 per share; until the making of the probate account there was never anything on the books of the executors, either in their accounts with Edmund M. Parker or elsewhere, to identify the investment as made on account of the trust fund, and there was evidence of a conversation in which one of the executors offered to con-

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vey to Edmund M. Parker and his sister, Mrs. Sheffield, the other legatee, interested in the general assets disposed of under the second clause of the will, other stock which belonged to the executors to make good the loss from this investment. We cannot say that the court was wrong in finding against the executors on the question whether the stock subscribed for was appropriated by them to the trust for the benefit of Edmund M. Parker and his descendants. For the purposes of the discussion, we have assumed without deciding that, if they had so appropriated it, the investment would have been one which they had a right to make.

The next question is whether the item of $1,000 interest on the proceeds of the sale of the 15–11 land should be accounted for by the executors as part of the proceeds given by the testator to his two children after payment of $50,000 to Dartmouth College.* This interest accrued from a fund which was to be kept by itself, of which a part belonged to the trustees of Dartmouth College, and the remainder to the two children of the testator. We are of opinion that the entire interest, as well as the principal which remained after the settlement with the trustees of Dartmouth College, belonged to the last mentioned legatees; that the account should be so stated, and, as the $1,000 has been used by the executors in paying charges against the estate, the estate should pay it to the children of the testator.

These legatees are not aggrieved by the refusal of the executors to continue to furnish them with maintenance under the will after December 31, 1884. The provision of the will under which payment was made was intended by the testator to secure maintenance for his family for a short time, while the assets of his estate were being collected and his debts being paid, and he doubtless contemplated their living together during that time in the family relation as members of one household.† The

* By a codicil to his will, the testator gave to his executors certain lands "in Township Fifteen (15) north of Range Eleven (11) west in the State of Michigan," in trust to sell and convey the same, and to pay over a certain portion of the proceeds of the sales to the trustees of Dartmouth College, to be held by them for certain specified uses, and the surplus of such proceeds to the testator's two children.

† By this clause of the will, the testator gave to his executors all debts due to him, and all his lands in certain States in trust, "to collect the debts,

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word "maintenance" used in this connection does not point to the full support of all his descendants for an indefinite period, without reference to their place of residence or their manner of living. He naturally expected payment of his debts in the ordinary course of the settlement of his estate within two years. We think the word should not be construed to require such maintenance after the expiration of more than nine years from the testator's death, and after the family had been broken up by the residence of his son, for nearly two years at one time, in a foreign country, and the marriage of his daughter, and the death of her husband, and the subsequent death of her mother, even though the son and daughter were again both occupying his former home.

The charges in the form of commissions for services in the management and sale of Town 15, Range 11, seem reasonable, and it has not been contended that they should not be allowed in some form. The parties seek to raise the question whether they should be charged against the proceeds of land 15–11, or against the general fund in the hands of the executors for administration, under the second clause of the will. We are of opinion that this question is not properly before us. If the last mentioned fund should be insufficient, after paying debts, to pay the pecuniary legacies in full, the legatees to be paid from it would have an interest in the question sought to be raised. The form of the account gave them no notice of such a question, and we must therefore decline to consider it. The allowance of the account will leave the question open.

The decree of the Probate Court is to be corrected, by stating the account as to the $1,000 interest on the proceeds of 15–11 land as hereinbefore indicated, and otherwise the same is affirmed.

So ordered.

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and to sell any of the lands as fast as may be necessary for the payment of my debts, and the suitable maintenance of my family until my debts are paid, with the expense of executing this trust to that time." For several years after the death of the testator's widow, and prior to the payment of the debts of the testator, the executors continued to make payments to the son and daughter as and for maintenance, charging them as such in their books. The amount of these payments they now sought to charge against the other interests of the son and daughter in the estate.

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MARY CONNERS *vs.* CITY OF LOWELL.

Middlesex. January 10, 1893. — March 8, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Highway Defect — Notice of "Place" — No Intention to mislead.

A notice to a city stated that, on a day named, a person had been injured by a defect, consisting of an accumulation of ice and snow "on the sidewalk on the westerly side of C. Street in said city, and nearly opposite premises on the corner of C. and D. Streets, occupied by S." In an action for such injury, it appeared that the premises of S. extended from the intersection of the westerly line of C. Street with the northerly line of D. Street sixty-three and one half feet northerly on C. Street; and that there was a gutter connected with S.'s house across the sidewalk. The plaintiff's evidence tended to show that he was injured on the sidewalk on the westerly side of C. Street within a distance of seven feet next northerly of the gutter and opposite the premises of S.; and that the defect was an accumulation of ice and snow which extended about seven or eight feet in a northerly direction from the gutter. *Held*, that the notice was sufficient; and that, as the notice had no tendency to mislead the defendant, the jury might have found that the plaintiff did not intend to mislead, and that the defendant was not in fact misled thereby.

TORT for personal injuries occasioned to the plaintiff by a defect in a highway in the defendant city. Trial in the Superior Court, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

It was admitted that the following notice was duly served on the defendant on February 3, 1891: "Lowell, Mass., Feb. 2nd, 1891. To the City of Lowell in the County of Middlesex and Commonwealth of Massachusetts, a municipal corporation: You are hereby notified that on the tenth day of January, 1891, at ten o'clock in the evening of said day, when I was walking, in the exercise of due care, on the sidewalk on the westerly side of Central Street in said city, and nearly opposite premises on the corner of Central and Centre Streets, occupied by William B. Spalding and numbered (1) one on said Centre Street, I fell and sustained severe bodily injuries, and the fall was occasioned by the rough, uneven, hubby, and ridgy condition of said sidewalk where I fell, by reason of an accumulation of ice and snow thereon. This notice is given for the purpose of fixing the lia-

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bilities of said city, as I claim compensation for injuries sustained by me as aforesaid. Mary Conners, by John J. Pickman, her Atty."

It was also admitted that Central Street was a public highway, which the defendant was bound to keep in repair, and was one of the main thoroughfares of the city, and extensively travelled by the public. The plaintiff put in evidence a plan, by which it appeared that Centre Street was thirty-four and six tenths feet wide, including the sidewalk, and leading westerly from Central Street; that the premises of Spalding, including the dwelling-house occupied by him on the corner of Central and Centre Streets, and the land connected therewith, extended from the intersection of the westerly line of Central Street with the northerly line of Centre Street sixty-three and one half feet northerly on Central Street and forty-one and two tenths feet westerly on Centre Street; that the sidewalk in front of Spalding's premises on Central Street was nine and seven tenths feet wide; and that there was a gutter connected with the dwelling-house of Spalding across the sidewalk. The plaintiff's evidence tended to show that the place where she received her injuries was on the sidewalk on the westerly side of Central Street, at some point included within a distance of seven feet next northerly of the gutter and opposite the premises of Spalding; that the defect was an accumulation of ice and snow, which extended in a northerly direction from the gutter about seven or eight feet; that the ice was from three to five inches in height at the highest place; that it was rounded at the top and in ridges of irregular shape and formation, which extended from the inside of the walk to the centre of the same; and that it had so existed for some days prior to the accident.

It was admitted that there were other premises on the westerly side of Central Street northerly of Spalding's premises, and also south of Spalding's premises on Central Street, commencing with the southerly line of Centre Street. The jury took a view of the premises.

The defendant offered no evidence, but, at the conclusion of the plaintiff's case, asked the judge to rule that, on the evidence, there was an inaccuracy in stating the place of the plaintiff's injury; that there was no evidence offered to show that there

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was no intention to mislead, and the defendant was not in fact misled thereby; and that, upon all the evidence in regard to notice, the plaintiff could not recover. The judge declined to rule as requested.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. J. Hogan, for the defendant.

J. J. Pickman, for the plaintiff, was not called upon.

KNOWLTON, J. The defendant excepted to the refusal of the court to take the case from the jury, on the ground that the notice was insufficient, and that there was no evidence to show that there was no intention on the part of the plaintiff to mislead, and that the defendant was not in fact misled by the notice.

The only criticism upon the notice is, that it stated the place of injury to be on the sidewalk nearly opposite the premises on the corner of Central and Centre Streets, occupied by William B. Spalding, when it was directly opposite these premises. The premises extended along the street sixty-three and one half feet. The designation of the place as on the sidewalk implied that it was not at the junction of the two streets within the limits of Centre Street, and the mention of Spalding's premises on the northerly corner indicated that the accident must have happened either opposite Spalding's estate, or very near it, farther north. The notice pointed to Spalding's premises as the nearest object by which to designate the place, and was in substance as if it had said "opposite or nearly opposite" those premises. As the length of Spalding's line was only sixty-three and one half feet, and as the evidence tended to show that there was a gutter there extending across the sidewalk and an accumulation of ice such as the notice described, we are of opinion that the notice was sufficient. *Spellman* v. *Chicopee*, 131 Mass. 443. *Lowe* v. *Clinton*, 133 Mass. 526. *McCabe* v. *Cambridge*, 134 Mass. 484.

We are also of opinion that, inasmuch as the notice had no tendency to mislead the defendant, the jury might have found that the plaintiff did not intend to mislead, and that the defendant was not in fact misled thereby. *Fortin* v. *Easthampton*, 142 Mass. 486. *Gardner* v. *Weymouth*, 155 Mass. 595.

Exceptions overruled.

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MARY A. P. WELD *vs.* ELIOT FIVE CENTS SAVINGS BANK.

Suffolk. January 10, 1893. — March 3, 1893.

Present FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Savings-bank Book — Order — Demand on Bank — Insufficient Tender — By-Law of Bank.

In an action against a savings bank for the amount of a deposit, brought by the depositor for the use of his assignee, it appeared that on April 26, 1892, the assignee made demand on the defendant for the amount due, which the defendant declined to pay because of the omission to specify the month and day of the month in the date of the plaintiff's order to the assignee. Fifteen days thereafter the defendant tendered to the assignee the sum due, but without interest for the fifteen days. The defendant contended that the plaintiff was bound to show that by the defendant's by-laws he was entitled to call for payment of the amount due without prior notice. *Held*, that it was for the defendant to show, if it could, that the plaintiff was not so entitled; that if the defendant had any rule entitling it to prior notice, it had not been made known to the court, and there was no legal presumption that it had; that the demand on April 26 was good; that the subsequent tender was insufficient, and that the plaintiff was entitled to judgment.

CONTRACT, by the depositor for the use of her assignee, to recover the amount of a deposit in a savings bank. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

During the year 1887 and thereafter Mary Ann P. Weld had on deposit with the defendant the principal sum of $1,000, the savings-bank book issued to her being numbered 18,420. On April 26, 1892, the amount standing to the credit of the book, including principal, interest, and dividends to that date, was $1,372.62. In the year 1887 Mary Ann P. Weld, the depositor, executed a written order or assignment, and duly delivered the same to William Minot, Jr., therein named, who, on or about April 26, 1892, indorsed the same on the back thereof, and duly delivered the same to Felix Rackemann, the indorsee. The order was as follows:

"1887. To the Treasr. Eliot Five Cents Savs. Bank, Boston, Mass. Sir, — Please pay to Wm. Minot, Jr., or order, all the moneys that have been and may be deposited, together with

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the interest that has and may become due, on account of book No. 18,420. Mary Ann P. Weld. Witness to signature, Francis M. Weld."

The indorsement was as follows:

"Pay the within to Felix Rackemann, trustee for Mary Ann P. Weld. Wm. Minot, Jr. Witness, J. Henry Russell."

At the time of the delivery of the order or assignment by Weld to Minot, the bank-book was also duly delivered to him, and at the time of the delivery of the order as indorsed by Minot to Rackemann, the bank-book was duly delivered to Rackemann. On April 26, 1892, during the usual banking hours of the defendant, Rackemann called at its banking rooms, presented the bank-book, together with the written order or assignment having the indorsement on the back thereof, to the teller of the defendant in charge, and Rackemann requested that the interest and dividends be figured and entered on the bank-book, and he then requested payment to him of the entire amount standing to the credit of the book, offering to deliver up the book and the order, and receipt for the money so received in any usual form. The defendant refused to pay Rackemann the order, stating, as its only ground of objection, that the order presented, signed by Weld, bore no date except the figures "1887." The defendant informed Rackemann that, if he would obtain the insertion in the order by Weld of a complete date, including day and month, they would honor and pay the order. This Rackemann declined to do, but demanded the said sum of $1,372.62. On May 11, 1892, the defendant handed to Rackemann a letter, a copy of which is as follows:

"Boston, May 11, 1892. Felix Rackemann, Esq., 23 Court Street, Boston. Dear Sir, — I hereby tender you payment of $1,372.62, being amount of deposit and interest as per deposit-book No. 18,420, in the Eliot Five Cents Savings Bank, standing in the name of Mary Ann P. Weld, upon your receipting for the same as attorney for Mrs. Weld, and delivering up order dated , 1887, and said deposit-book. Yours truly, Eliot Five Cents Savings Bank, by Frank E. Granger, Treasurer."

The defendant at the same time tendered Rackemann the sum of $1,372.62, in legal tender, which tender Rackemann declined to receive on the terms stated in the letter.

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The order presented to the defendant by Rackemann was in all respects in the form prescribed by the defendant in the ordinary conduct of its business; and the defendant customarily allowed interest semiannually on deposits with it at the rate of four per cent per annum.

If the demand of Rackemann on the defendant, on April 26, 1892, was a good demand, judgment was to be entered for the plaintiff for $1,372.62, with interest from that date at six per cent and costs; otherwise for $1,372.62, with interest at four per cent without costs, unless the tender was good, in which case judgment was to be entered for the plaintiff for $1,372.62, without interest or costs.

A. Blume & J. Willard, for the defendant.

F. Rackemann & E. L. Dresel, for the plaintiff.

ALLEN, J. The defences set up in the defendant's answer were, first, a general denial, and, secondly, a tender. The plea of tender was bad, because not accompanied by a *profert in curia*. *Carley* v. *Vance*, 17 Mass. 389, 392. *Storer* v. *McGaw*, 11 Allen, 527. *Brickett* v. *Wallace*, 98 Mass. 528. This, however, is now immaterial. The facts being agreed, defects in pleading are waived, and the case is to be determined on its merits.

It is agreed that on April 26, 1892, the sum due on the bank-book was $1,372.62. The plaintiff on that date was entitled to demand and receive that sum. The omission to specify the month and day of the month in the date of the depositor's order to make payment to Mr. Minot did not invalidate that order, and the defendant was not thereby excused from the duty of paying the amount to Mr. Rackemann upon his demand.

Fifteen days afterwards, the defendant offered to pay that sum to Mr. Rackemann, but for some reason the parties were both standing upon their extreme rights, and he then refused to take the money. The tender was bad, because it did not include the interest for the fifteen days.

The defendant now contends that the plaintiff was bound to show that by the rules or by-laws of the defendant he was entitled to call for payment of the amount of the deposit without prior notice. But we think, on the contrary, that it was for the defendant to show, if it could, that he was not so entitled. If the defendant had any rule entitling it to prior notice, it is

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not made known to us, and there is no legal presumption that it had.

So far as is now made to appear, the demand on April 26, 1892, was a good demand; the subsequent tender was insufficient; and, according to the agreement of the parties, judgment must be entered for $1,372.62, with interest from that date at the rate of six per cent, and costs. *Judgment accordingly.*

ELIZABETH STIMPSON, administratrix, *vs.* ROBERT E. ACHORN.

Suffolk. January 11, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Conversion — Gift from Husband to Wife — Title to Personal Property — Evidence — Fraud — Estoppel.

Even if a gift of personal property from a husband to his wife, considered as an attempt to make the same her sole and separate property, is invalid both under the Pub. Sts. c. 147, § 3, and at common law, yet, as administratrix of his estate, she has a good title thereto.

In an action by an administratrix for the conversion of the intestate's personal property, declarations of the intestate, who was the husband of the plaintiff, that he had put all his property out of his hands, it not being suggested that the statement referred to any other disposition of personal estate than a gift to his wife, was held rightly excluded.

In an action by an administratrix for the conversion of the intestate's personal property there was evidence of an agreement to sell and of a subsequent bill of sale, which did not purport to convey the plaintiff's property, but only that of others located in the place where the plaintiff's was stored. *Held*, that the judge rightly ruled that there was no evidence to warrant a verdict for the defendant.

While a principal may be bound by the fraudulent conduct of an agent while acting for him in making a sale, he will not be affected by the agent's fraud in selling the property of another person and pretending at the same time that the principal's property belonged to that other, and was included in the sale; nor can the principal be estopped on the ground that, while having authority to represent the principal in selling his goods, the agent stood by and permitted the principal's goods to be sold and paid for as the property of another.

TORT, for the conversion of a lot of furniture, etc., the contents of a hotel in Mattapoisett.

At the trial in the Superior Court, before *Bond*, J., it ap-

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peared in evidence that William H. Stimpson, the plaintiff's intestate, who died about January 1, 1888, had owned the property in question, and that the plaintiff herself and George R. Stimpson, her adopted son, who, it appeared, was her fully authorized agent to manage her property and to sell the personal property in question, were the only witnesses as to the title of the plaintiff, and testified that William H. Stimpson did not, to their knowledge, sell this property during his lifetime. It also appeared that the hotel in question, and the land on which it stood, had belonged to William H. Stimpson, and that he had given his wife, Elizabeth Stimpson, the furniture the subject matter of this suit, during his lifetime, not by any conveyance in writing, or by the agency of or delivery to a third person, but by a verbal gift direct to his wife, and that the plaintiff and George R. and Maria W. Stimpson, his wife, had assumed that such gift was valid, and that Elizabeth Stimpson owned the furniture. It further appeared that Elizabeth was appointed administratrix on or about January 1, 1891, for the purpose of bringing this suit; that the suit was brought in that month; that, by mesne conveyances, the real estate had come into the name of Maria W.; that in the fall of 1890 the real estate was put by Maria W. in the hands of one Nason, an agent, to be sold; that at the same time Nason was authorized (if the plaintiff at that time had power so to authorize) to sell the personal property, the subject of this suit, and that Nason was instructed to sell either the hotel alone or the hotel with the furniture.

It further appeared that George R. Stimpson was the owner of certain articles of furniture within the hotel, to wit, one gas machine, office counters, one common chamber set, and the gas fixtures in the house, as appeared by enclosure in a letter of October 30, 1890, written by George R. Stimpson to the defendant in this action, a copy of which is hereinafter contained; that, in pursuance of such instructions, Nason, on October 7, 1890, made a written contract between Maria W. Stimpson, in her own right, and the defendant, whereby the said Maria agreed to sell the real estate, including the building and stable and "all the personal property in said house belonging to me," full possession to be given at the time of the delivery of the deed, October 17, 1890, "and the bill of sale of all the personal property in

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said house"; and that on or about October 23 Maria W. and Nason went to Plymouth, and there delivered to the defendant a deed of the real estate, properly executed by Maria W., and a bill of sale, of which the following is a copy :

" Boston, Oct. 23, 1890. Received of Robert E. Achorn one dollar, in full for the furniture in the Mattapoisett House belonging to me, the same that was included in the sale of said property. George R. Stimpson."

The defendant offered to show by one Bowles, who was called by him as a witness, that William H. Stimpson, the plaintiff's intestate, during his lifetime told Bowles that he (William H. Stimpson) had put all his (William H. Stimpson's) property out of his hands, both real and personal. On the plaintiff's objection the judge excluded the evidence, and the defendant excepted. It was not suggested by the defendant that this statement referred to any other disposition of the personal estate than the gift to the wife, Elizabeth Stimpson. It appeared further that on October 23, 1890, the deeds called for by the agreement were passed, and the cash called for paid at Plymouth ; that at the time there were present Maria W. Stimpson, Nason, and the defendant ; and that at the time of signing the agreement and at the time of passing the deeds and the paying the cash the defendant was occupying the real estate, and was in possession of the personal property in question as assignee of a lease by the lessee of the property which had expired or was about to expire. Nason, among other things, testified that in the spring of 1890 he went to Mattapoisett with George R. Stimpson to examine the hotel and furniture ; that George R. Stimpson told him to advertise the property and sell it by private sale, the hotel and furniture ; that he (Nason) supposed that the furniture — now the subject of this suit — belonged to Elizabeth Stimpson in her own right, that during the summer of 1890 he saw the plaintiff at his own office and house a good many times, and had talks with her about the Mattapoisett Hotel and furniture in it, and that she told him to sell the personal property and the real estate, — to sell the personal property with the house ; and that at the time of executing the written agreement on October 7, 1890, the defendant spoke of the personal property, and the words " and the bill of sale of all the personal property in said house" were interlined

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in the agreement by him (Nason) and before the agreement was signed. George R. Stimpson testified that the words "and bill of sale of all the personal property in said house," which were inserted in a printed blank in the handwriting of Nason after the words "full possession of the said premises," etc., were not in the agreement when the same was shown to him at some time between October 7 and October 23 by Nason, and that the agreement had at that time been signed by both Nason as agent and by the defendant. Nason further testified, that in Septemtember, 1890, while negotiations for the sale were going on, he reported to George R. Stimpson the defendant's offer of $6,000 for "the hotel property," and that he (Nason) as George R. Stimpson's agent had refused the offer, and then asked for instructions. In reply, George R. Stimpson authorized him (Nason) to sell at $6,500, — "told me to sell the property to Mr. Achorn for $6,500, or, if I could n't do any different, in case I could n't get $6,500, let him (Achorn) split the difference ($6,250), including the furniture."

George R. Stimpson testified that Nason told him that he thought he could get $6,500 for the house without the furniture, and that Nason then asked, "Suppose I could get you $6,000 clear for the house, and my commission above that?" and said, "I will get my commission clear over and above $6,000, and the furniture not to go"; that a question was raised by Nason as to the ownership of the gas fixtures and the gas machine, and that Nason asked Stimpson if he owned any furniture in the house; that Stimpson replied that he did own one chamber set, and, to avoid any question, would give a bill of sale of the gas fixtures and the gas machine, and throw in the chamber set, and that Nason afterwards showed him the agreement, and that Stimpson then said, "It is signed for Maria W. Stimpson, and she don't own a cent's worth of furniture"; Nason said, "That don't make any difference to you, does it?" Stimpson replied, "Certainly; it ought to be what I have got." Nason replied that it made no difference. Nason testified, that at the time the papers were passed at Plymouth, a bill of sale, the same as printed above, was delivered to the defendant; that there were then present Maria W. Stimpson, J. L. Nason, and the defendant. Nason's evidence on this point was as follows:

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"*Q.* Will you tell us what you said at that time. *A.* I called for the bill of sale of the personal property that I prepared the Saturday previous for them to sign and have at the record office with him. When we went down in the morning, Mrs. Stimpson handed me another bill of sale. It was not the bill of sale that I prepared; it read different. She said Mr. Stimpson prepared it, as he wanted it his way.

"*Q.* What was said in Mr. Achorn's presence? *A.* She read the bill of sale and delivered it to Mr. Achorn in my presence.

"*Q.* What did you say to her there that this bill of sale carried? *A.* The personal property in the house at Mattapoisett that he was already in possession of."

Maria W. Stimpson testified that George R. Stimpson handed her the bill of sale in Boston, and that she handed the same to Nason while on the train travelling to Plymouth, and that the same was handed by said Nason to the defendant without remark.

Maria W. Stimpson further testified that, when the papers were passed, the defendant asked her for a list of the furniture owned by George R. Stimpson and transferred by the bill of sale, and that she promised to send him such list.

The day after papers were passed at Plymouth, George R. Stimpson mailed to the defendant, and the defendant admitted receiving, the following letter:

"Boston, Oct. 24, 1890. Mr. Robert E. Achorn. Dear Sir, Mrs. G. R. Stimpson says you spoke to her regarding list personal property belonging to her or myself in the Mattapoisett House that you purchased. I will send you same soon, and that not belonging to us, Mrs. E. Stimpson, the owner, says may remain, if you desire, until she decides to remove it, or should you be ready to furnish, and it be in your way, let her know and she will immediately remove the same, or she will sell you at appraisal by good parties, if it is such as you want. Yours very resp'fly, Geo. R. Stimpson."

On October 30, 1890, George R. Stimpson mailed, and the defendant received, the following letter:

"Boston, Oct. 30, 1890. Mr. R. E. Achorn. Dear Sir, Please find enclosed list personal property sold to you with Mattapoisett House. Shall be pleased to appraise and sell you, or to

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agree on price, or, if you desire it not at all, will have it removed at your order, but please let me know by return mail surely your decision; should I receive no answer, shall expect you desire it taken out, and shall of course immediately remove same. I will confer with my mother, the owner, upon any suggestion you make and let you know as aforesaid. Yours, G. R. Stimpson."

This letter contained the following enclosure:

"Boston, Oct. 30, 1890. List personal property that was in Mattapoisett House belonging to G. R. Stimpson, as per bill of sale given Robert E. Achorn, viz. (see letter Oct. 30, 1890): 1 gas machine, office counters, 1 common chamber-set; gas fixtures in house. Recvd payment, by sale hotel. G. R. Stimpson."

The defendant made no reply to either of these letters, or to several succeeding. About December 1, George R. Stimpson went to Mattapoisett, and for the first time learned that the defendant claimed to have purchased the furniture at the time of the purchase of the hotel.

At the conclusion of the evidence, the defendant asked the judge to rule as follows: "If the jury find that the plaintiff, either by herself or her agents, knowingly caused or allowed the defendant to believe that, upon the payment by him of the cash agreed upon in the sale of the hotel and the delivery of the deed of the hotel to him, all the personal property belonging to the plaintiff that was there at the time of such payment and delivery in the hotel, should thereupon belong to him, the defendant, and that the defendant while so believing, and while the plaintiff, either by herself or her agents, knowingly caused or allowed him so to believe, paid such cash, and received delivery of said deed, and that the said personal property was, at the time of such payment and delivery, in the defendant's possession, the verdict must be for the defendant."

The judge refused so to rule, and ruled that "the only question for the jury was the assessment of damages."

The jury found for the plaintiff; and the defendant alleged exceptions.

E. D. Stetson, for the defendant.

G. W. Anderson, for the plaintiff.

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KNOWLTON, J. The plaintiff, as administratrix, had a good title to the property in question. The gift from her husband to her, considered as an attempt to make the furniture her sole and separate property under our statute, was invalid. Pub. Sts. c. 147, § 3. At common law, such a gift cannot transfer the property during the lifetime of the husband, and can take effect after his death only in case it does not interfere with the claims of creditors, and in case there was a delivery in his lifetime and a retention of possession by the wife. The gift is revocable, and, if the property is subsequently taken back into the possession of the husband, the wife's right is at an end. *Spelman* v. *Aldrich*, 126 Mass. 118. *Fellows* v. *Smith*, 130 Mass. 378. *Marshall* v. *Jaquith*, 134 Mass. 138. In the present case, it does not appear that there was any delivery to the plaintiff by her husband, or that she was ever in possession in his lifetime.

The testimony, offered by the defendant, of the declaration of the plaintiff's intestate, that he had put all his property out of his hands, it not being suggested that the statement referred to any other disposition of the personal estate than the gift to his wife, was immaterial. It had no tendency to contradict the plaintiff's present contention.

The court rightly ruled that there was no evidence to warrant a verdict for the defendant. The agreement to sell, and the subsequent bill of sale, did not purport to convey the plaintiff's property, but only that belonging to Maria W. Stimpson and George R. Stimpson. It is not contended that the defendant took any title to this property under those writings.

The contention is that the plaintiff is estopped from claiming the property because of the conduct of Nason and George R. Stimpson, her agents, in so acting as to induce the defendant to believe that he was getting a good title under the writings. There is no evidence to connect the plaintiff personally with these transactions, and if we assume that there was evidence against Nason or George R. Stimpson such as would warrant a finding of fraud against them, and work an estoppel against the plaintiff if she were bound by their conduct, the answer to the defendant's contention is that they were the plaintiff's agents only to sell her property. She might be bound by their fraudulent conduct while acting for her in making a sale, but she would

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not be affected by their fraud in selling the property of another person, and pretending at the same time that her property belonged to that other and was included in the sale; nor could she be estopped on the ground that, while having authority to represent her in selling her goods, they silently stood by and permitted her goods to be sold and paid for as the property of another. Such an act would not be within their authority, nor done in the transaction of her business. There was nothing disclosed at the trial to interfere with the right of the plaintiff to recover the value of her property.

Exceptions overruled.

F. ALARIC PELTON *vs.* WILLIAM H. BAKER.

Suffolk. January 12, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Agreement between Attorneys — Right to sue — Construction of Contract — Instruction — Unsatisfied Judgment.

B., the defendant, signed a contract, in consideration of the promise of A., the plaintiff, to do nothing about a claim of A.'s client against B.'s client until the decision of a suit which B.'s client had against C. and D., and which B. was managing. The contract, which was signed by B.'s client, directed B., to whom it was addressed, when he had collected the money on the suit against C. and D. to pay a certain sum to A., and B. signed underneath the words, "When the above amount is collected, I will pay the same to A." The money was collected by B.'s client of D. alone, C. being only the surety on D.'s bond. *Held*, in a suit by A. against B. to recover the amount named in the contract, that the contract was a binding one; that the jury were warranted in finding that the suit referred to was the suit against D.; that it was immaterial that the whole sum owed to B.'s client was not collected; that the instruction to the effect that, if B.'s client forbade A. to pay the order, A. could not recover, qualified by the statement that, if B. had control over the collection, so that he could receive the money or not as he pleased, his allowing his client to receive it would not make it any the less his collection, was correct; and that the fact that A.'s client, after the breach of B.'s agreement, brought a suit and recovered judgment against B.'s client upon the original claim against him, which judgment was unsatisfied, did not preclude A. from maintaining his action.

HOLMES, J. This is an action of contract between two lawyers. The defendant signed the contract sued upon, in consideration of the plaintiff's promise to do nothing about a claim of

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his clients against Griswold, the defendant's client, until the decision of a suit which Griswold stated that he had against Myers and Dimock, and which the defendant was managing. The contract was in the form of an order addressed to the defendant by Griswold, and accepted by the defendant, as follows:

"William H. Baker, Esq. Dear Sir, — When you have collected from Messrs. Myers and Dimock the sum owed to me by them, which is now in suit, please pay to F. Alaric Pelton $133.25, and charge the same to my account. Mr. Pelton is attorney for Arthur Young & Co., and will give you a receipted bill against me in return. Yours truly, William Griswold."

"When the above amount is collected, I will pay the same to plaintiff's attorney, F. Alaric Pelton. W. H. Baker."

The suit referred to was a suit against Dimock, in which Myers was surety on a bond given to dissolve an attachment. Griswold testified that the sum owed to him was not less than $551. After the agreement the suit was settled for $400. The money was paid directly to Griswold, and the jury would have been warranted in finding that this was done in pursuance of a scheme between the defendant and his client to evade the agreement with the plaintiff. The agreement was not performed, and the sum due to the plaintiff's clients, Young and Company, has not been paid. The jury found for the plaintiff, and the case is here on exceptions, substantially to the refusal of the court to take the case from the jury, on the ground that there was no binding contract with the plaintiff, or that, if there was one, the condition of the promise was not satisfied, because the whole sum owed to Griswold was not collected, and what was collected was not collected from Myers and Dimock, but from Dimock, and was not received by the defendant.

The defendant's promise ran to the plaintiff in form, but the most plausible defence would be the formal objection that, as the effectual counter promise to suspend action against Griswold must come from the plaintiff's clients, the plaintiff was a stranger to the consideration. *Gilmore* v. *Pope*, 5 Mass. 491, 493. But it was for the convenience of all parties that the lawyers should agree directly with each other, and the jury were warranted in finding that the plaintiff bound himself personally to some ex-

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tent, and that his promise was the consideration for an undertaking to him personally, even if his right to sue would not follow as matter of law from a finding of his liability. *Savage* v. *Blanchard*, 148 Mass. 348, 350. The rule has been laid down in broader terms. *Colburn* v. *Phillips*, 13 Gray, 64. *Borrowscale* v. *Bosworth*, 99 Mass. 378, 383. See *Albany & Rensselaer Co.* v. *Lundberg*, 121 U. S. 451, 453; Mechem on Agency, §§ 755, 756. The question of double liability on a written instrument is somewhat different from that as to the right to sue. *Byington* v. *Simpson*, 134 Mass. 169.

The jury were warranted in finding that the suit referred to was the suit against Dimock, the only suit that Griswold had, so far as appears, and the one understood by all parties to be meant. The defendant's promise, properly construed, did not require that all that Griswold claimed to be due to him should be collected as a condition. It was enough if a sum sufficient to pay the plaintiff was accepted as a payment of Griswold's claim. Indeed, the literal meaning of the defendant's words, "When the above amount is collected, I will pay the same" to Pelton, is not sensible unless the word "amount" is taken to refer to the $133.25, not to the whole sum owed to Griswold. It hardly is necessary to add, that it did not matter, under the contract, whether the money was collected from Dimock or from Myers, or from both.

It is urged that the judge should have ruled that, if Griswold forbade the defendant to pay the order, the plaintiff could not recover. The judge did instruct the jury to that effect, in terms sufficiently favorable to the defendant, but also instructed them that, if the defendant had control over the collection, so that he could receive the money or not as he pleased, his allowing Griswold to receive it would not make it any the less his collection. This instruction was not excepted to, and was a proper caution to the jury that the plaintiff was not to be defeated by a mere device.

The plaintiff's clients, Young and Company, after the breach of the defendant's agreement, brought a suit, and recovered judgment against Griswold upon their original claim against him. It is argued that this judgment unsatisfied in some way precluded the plaintiff from maintaining his action on the contract made

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with him. No doubt payment by Griswold would have cut the defendant's liability down at least to nominal damages, if it would not have extinguished it. But the case is not the simple one of a party having an election to sue principal or agent. *Williams* v. *Mercer*, 139 Mass. 141, 143. The present contract is collateral to the original liability, and the plaintiff, as well as the defendant, is different. Both claims properly may be pursued to judgment. *Vanuxem* v. *Burr*, 151 Mass. 386.

Exceptions overruled.

E. Greenhood, for the defendant.

F. N. Nay, (*F. A. Pelton* with him,) for the plaintiff.

HORMISDAS CARDINAL *vs.* BENJAMIN HADLEY.

Middlesex. January 17, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Oral Evidence — Mistake in Consideration of Deed — Right to recover Overpayment — Waiver.

Oral evidence is admissible to show that a mistake was made in the computation of the consideration of a deed; and the grantee's right to recover the amount which he has overpaid is not waived by his acceptance of the deed, or by his payment, after the discovery of the mistake, of a note which he gave as part of the consideration of the deed, and which was received by the grantor as cash.

CONTRACT for money had and received. The answer was a general denial, payment, and accord and satisfaction. At the trial in the Superior Court, without a jury, before *Thompson*, J., it appeared in evidence that the plaintiff purchased a lot of land in Everett of the defendant, receiving therefor a warranty deed in which the consideration was stated as one dollar. The judge allowed the plaintiff to introduce oral evidence, against the defendant's objection, that the plaintiff purchased the premises in question from the defendant by the foot, and not for a lump sum, and the defendant excepted. It appeared in evidence, and was uncontradicted, that before the making of the deed the plaintiff and the defendant went upon the land, and the plaintiff

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was shown the premises and examined the same, and that the parties computed the number of feet therein, and the judge found that the plaintiff agreed to buy the land at eleven and one half cents a foot. What the plaintiff computed and stated the number of feet to be, at eleven and one half cents a foot, would come to the sum which the plaintiff paid.

There was no question but that the plaintiff got all the land that was shown him, and that it was agreed that he should have. It also appeared in evidence that part of the consideration paid the defendant was a note, which was received by the defendant as cash. It also appeared that before this note was paid the plaintiff had the land measured, and ascertained that the number of feet in the lot was not as many as was computed and stated by the defendant. There was no claim on the part of the plaintiff of any fraud by the defendant, or that the land conveyed was not all the land contained within the boundaries shown to the plaintiff by the defendant.

The defendant asked the judge to rule: 1. That the plaintiff by taking the deed offered in evidence as the deed received by him, waived all right to maintain the action. 2. That the plaintiff by taking the deed waived all right to maintain the action because of the failure of the piece of land to contain the exact number of feet he thought the piece ought to contain. 3. That the plaintiff by taking the deed had thereby, in absence of fraud, waived all right to object to the failure of the deed to contain the exact quantity of land named therein. 4. That the plaintiff by taking the deed waived all right to maintain this action for failure of the deed to give him the number of feet he expected the piece of land to contain. 5. That the plaintiff could not show by oral evidence that the defendant orally agreed that the price of the land was to depend upon the number of square feet contained in the parcel conveyed. 6. That upon the competent evidence offered the action cannot be maintained.

The judge declined so to rule, and found for the plaintiff; and the defendant alleged exceptions.

F. M. Davis, for the defendant.

H. Dunham, for the plaintiff.

BARKER, J. 1. The exceptions to the admission of oral evidence, and to the refusal to rule that the plaintiff could not

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show by such evidence that the price of the land was to depend upon the number of square feet in its area, must be overruled. It was long since declared by this court to be well settled, that both the statement of consideration in a deed and the recital of its payment may be varied and controlled by parol evidence. *Gale* v. *Coburn*, 18 Pick. 397, 401. *Clapp* v. *Tirrell*, 20 Pick. 247, 250. See also *Wallis* v. *Wallis*, 4 Mass. 135; *Wilkinson* v. *Scott*, 17 Mass. 249, 257; *Preble* v. *Baldwin*, 6 Cush. 549, 553; *Paige* v. *Sherman*, 6 Gray, 511, 513; *Miller* v. *Goodwin*, 8 Gray, 542; *Egan* v. *Bowker*, 5 Allen, 449; *Pickman* v. *Trinity Church*, 123 Mass. 1, 8.

2. The plaintiff did not waive his right by accepting the deed. He bought land by the square foot, and in fixing the sum to be paid the area was not estimated, but was computed, and a mistake against him was made in the computation. In ignorance of the mistake, he paid the sum so computed, and after discovering the mistake brought his action to recover the amount overpaid by reason of the mistake.

The case is easily distinguished from those upon which the defendant relies to show a waiver of the right of action by accepting the deed. In *Williams* v. *Hathaway*, 19 Pick. 387, the land was sold by the estimated area. *Pickman* v. *Trinity Church*, *ubi supra*, cited by the defendant, is a plain authority against him. In that case the mistake was not one of computation, but arose from a misapprehension as to the title of a strip of land covered by a wall. *Lewis* v. *Jewell*, 151 Mass. 345, was an action for false representations of quantity in a sale of carpets, and has no bearing on the present case, turning only on the question as to whether the purchaser used due diligence in relying on the representations of the seller. The case also differs from that of *Noble* v. *Googins*, 99 Mass. 231, because there the price was an entire sum, in fixing which no regard was had to the area, while in the case at bar the quantity of land was made an essential element of the bargain. The case at bar is analogous to the cases of *Paige* v. *Sherman*, 6 Gray, 511, *Tarbell* v. *Bowman*, 103 Mass. 341, and *Pickman* v. *Trinity Church*, *ubi supra*, in each of which the price depended upon the area, and was erroneously fixed and paid under a mistake of fact. Because the agreement here was not for an entire

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sum, and the quantity of land was an essential element of the bargain, and fixed the price to be paid, the plaintiff did not waive his right to recover the money paid by mistake by accepting a deed which was silent as to the quantity of land, although the description was by monuments, and also by measurements stated to be "more or less." The deed shows clearly enough that no other land was intended than the lot within the monuments, but has no tendency to show that the parties agreed that its area was as computed by them when fixing the sum to be paid for the land. It has no bearing on the present issue.

3. The payment of the note after the discovery of the mistake is no bar to the action. It was originally received as cash, and its amount is not stated. There is nothing to show that it would not have been given if there had been no mistake. The defendant has not been harmed by its payment, and the plaintiff was not compelled to expose himself to a suit by attempting to set off against it his present cause of action.

Exceptions overruled.

GEORGE E. LEAVITT *vs.* EDWARD W. LEAVITT & another.

Suffolk. January 18, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence — Inconsistent Evidence — Question for the Jury.

In an action for personal injuries occasioned to the plaintiff by an elevator which the defendants used to get their goods to their premises, the plaintiff's evidence was confused and inconsistent, in that he stated that he did not perceive that the elevator was in motion until he was injured, and also that he saw two of the defendants' servants start the elevator. These servants were not fellow servants with the plaintiff, who was a teamster employed by a carrier, and not an employee of the defendants. *Held*, that however much the plaintiff may have contradicted his own statements, and however dull and inconsistent he may have been as a witness, it was for the jury to weigh his statements and find the facts.

TORT for personal injuries occasioned to the plaintiff by an elevator used by the defendants. Trial in the Superior Court,

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before *Thompson*, J., who directed a verdict for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

B. C. Moulton, for the plaintiff.

G. W. Anderson, for the defendants.

BARKER, J. The defendants occupied the second and third floors of a building. An elevator ran from the ground floor up through the building, and had an entrance from the sidewalk. The defendants used the elevator to get their goods to their premises. It was also used by other occupants of the building. The plaintiff was a teamster, and customarily employed to deliver to the defendants rolls of leather. The method of delivery, used at their request, was to place the rolls on the elevator platform instead of leaving them on the sidewalk. On the day of the accident, having occasion to deliver leather to the defendant, he drove to the place, called out, "Elevator," and it was let down to the sidewalk level for his use. He proceeded to pile the rolls of leather upon it. One of them slipped or rolled from the pile, and was caught between the elevator and the wall. He went upon the platform to dislodge the roll, and place it upon the pile. While doing this the elevator started, and his foot was caught and crushed.

The plaintiff's evidence as to how the accident happened was confused and inconsistent. He testified that he did not perceive that the elevator was in motion until his heel was caught, and that he then immediately fainted, and did not regain consciousness until removed from the elevator. But he also testified that he saw two of the defendants' employees start the elevator. The jury alone could deal with this evidence, and it was competent for them to find that the elevator was started while he was at work upon it, and that it was started by the defendants' servants. These servants were not fellow servants with the plaintiff, who was a teamster employed by a carrier, and not an employee of the defendants. The jury could have fairly found, not only that the elevator was set in motion by the defendants' servants, but that in so doing they were engaged in the defendants' work. It cannot be denied that, if the defendants had invited the plaintiff to use the elevator, and knew or ought to have known that he was engaged in loading goods upon it,

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it was negligent for them to put it in motion while the plaintiff was so engaged.

Of all these things there was evidence in the plaintiff's own testimony, and however much he may have contradicted his own statements, and however dull or inconsistent he may have been as a witness, it was for the jury to weigh his statements and find the facts. The case should have been submitted to them. *Exceptions sustained.*

CHARLES H. ROBINSON & another *vs.* LEWIS J. BIRD.

Suffolk. January 20, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Conversion — Conditional Sale — Rights of Mortgagee — Constructive Notice.

A. delivered goods to B., and B. agreed in writing to pay therefor by instalments, and not to sell or mortgage the same so long as any payments were due. B. mortgaged the goods to C., who took without notice and for value, and had the goods sold by auction for breach of the mortgage, which had been duly recorded in the office of the city clerk. At the time of the mortgage B. was in default according to the agreement, and by the terms thereof A. had an immediate right of possession without demand or notice. *Held*, that the auctioneer was liable to A. for conversion of the goods.

TORT for conversion. The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, on agreed facts, in substance as follows.

The plaintiffs, who were dealers in furniture in Boston, on February 9, 1886, sold to Mrs. Linda Bryant a quantity of furniture under the terms of a written agreement, dated February 9, 1886, which provided as follows:

"For the use of the above mentioned articles, and as rent for the same, I have this day paid to the said C. H. Robinson & Co., as rent in advance, the sum of dollars, and promise further to pay to them and their legal representatives the sum of thirty-two dollars per month, the second payment to be made on the thirteenth day of March, 1886, and until such time as the sums so paid and to be paid by me shall amount to the sum of

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$1,056.86, and such further sums as may be added to the above amount by me, at which time said rent shall cease, and said articles become my absolute property. But in case of failure to pay said rent as aforesaid, the said C. H. Robinson & Co., or their agents, may, without demand or notice, or being deemed guilty of any trespass or tort, and without thereby rendering themselves liable to refund any sums received by them as rent aforesaid, enter any house or place where said articles may be, and examine, or take possession of and remove said articles therefrom. And I further agree that, so long as said rent shall be payable as aforesaid, I will not injure, sell, mortgage, or relet the said articles, or remove the same from above mentioned place; and that, in case of failure to pay said rent, I will, on demand, return said articles to the said C. H. Robinson & Co., or their legal representatives."

The furniture was delivered to Linda Bryant at Allston, on February 9 and 10, 1886, and was afterwards removed, with the consent of the plaintiffs, to the Oakland House, Oak Square, Brighton, where it was seen by the collectors of the plaintiffs. It was afterwards removed, with the consent of the plaintiffs, to the Oregon House, Washington Street, Boston, where it was also seen by their collectors and representatives. On September 22, 1886, Linda Bryant mortgaged to one John Stetson, of Boston, for the sum of three hundred dollars, all the property in the Oakland House, Oak Square, Brighton, which mortgage included and covered the furniture claimed by the plaintiffs, beside other things set forth in the mortgage, which mortgage was duly recorded in the clerk's office of Boston. In August, 1890, Stetson, the mortgagee, the mortgage being overdue, and part of the interest and the entire principal being unpaid, duly foreclosed and took possession, through his agent, of all the property of the Oregon House, including goods received by Linda Bryant from the plaintiffs under the agreement, and carried the same to the public auction-rooms of the defendant, in Boston; and the defendant, acting in the capacity of auctioneer, sold the property at his said auction-rooms and paid over the proceeds less his commission to Stetson, in ignorance of any claim or rights of the plaintiffs, and in ignorance of the written agreement; and Stetson received from

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the defendant the proceeds from the sale of the property, in ignorance of any interest of the plaintiffs in the same, and ignorant of the fact that any part of the property covered by the mortgage was purchased of the plaintiffs under the terms set forth in the written agreement. The defendant acted in good faith, and received the first information of any claim of the plaintiffs after the goods were sold and had passed out of his possession, and the proceeds had been paid over to Stetson. Under the written agreement, the amount to be paid by Linda Bryant to the plaintiffs was thirty-two dollars per month; at the time the goods were delivered, on February 9 and 10, 1886, the sum of sixty dollars was paid by Linda Bryant on account of the total of ten hundred and fifty-six dollars, and Linda Bryant was at all times, after the payment of the sixty dollars, in arrears with her payments. The plaintiffs never enforced the return of the goods or retook possession of the same under the power expressed in the written agreement, and never enforced any demand whatever upon either Linda Bryant or the defendant for the return of the goods, or the amount due on the written agreement, except that the plaintiffs did, through their agents and collectors, constantly endeavor to collect the amounts due from Linda Bryant by repeated demands upon her, in which they were not successful, except to collect at various times during four years or more certain amounts indorsed on the back of the agreement, which in the aggregate amounted to six hundred and sixteen and $\frac{80}{100}$ dollars. The plaintiffs were ignorant, and had no actual notice of the Stetson mortgage until discovered by them after the goods had been sold by the defendant, and after the defendant had turned the proceeds over to Stetson. Linda Bryant disappeared just before the date when Stetson took possession of the property under his mortgage. Up to the time of the foreclosure, the plaintiffs had, at all times, the opportunity, if they desired, to retake possession of the goods under the contract.

If the plaintiff was entitled to recover, he was to receive a judgment of two hundred dollars and costs; otherwise, judgment was to be for the defendant and his costs.

R. R. Gilman & W. H. Mitchell, for the defendant.

W. F. Kimball, for the plaintiffs.

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HOLMES, J. The defendant is an auctioneer, who has sold personal property belonging to the plaintiffs. Therefore he is liable for a conversion, unless he can show some other excuse or justification than his good faith and his ignorance of the plaintiff's title. *Coles* v. *Clark*, 3 Cush. 399. *Hoffman* v. *Carow*, 22 Wend. 285. *Cochrane* v. *Rymill*, 40 L. T. (N. S.) 744. *Hollins* v. *Fowler*, L. R. 7 H. L. 757. The mere fact that the plaintiffs made a bailment to Mrs. Bryant, and that she mortgaged the goods to Stetson, who took without notice and for value, and directed the present sale, is not such a justification. The passage to the contrary in the note to *Wilbraham* v. *Snow*, 2 Wms. Saund. 47 a, cited in *Vincent* v. *Cornell*, 13 Pick. 294, 296, is a misunderstanding of the Year Books, on a matter as to which their doctrine no longer is the law, as every one knows, and as may be seen from the later additional note. See *Hirschorn* v. *Canney*, 98 Mass. 149, 150, 152; *Coggill* v. *Hartford & New Haven Railroad*, 3 Gray, 545. The explanation of the early law is a matter of antiquarianism, which would be out of place here.

If at the time of the sale Mrs. Bryant had had a right of possession, to the exclusion of the plaintiffs, which was not terminated by the sale, the plaintiffs could not have maintained trover; and this principle is applied against a seller upon a conditional sale, so called, where the plaintiff reserves the title, if the time for payment has not arrived at the time of the alleged conversion. *Newhall* v. *Kingsbury*, 131 Mass. 445. *Day* v. *Bassett*, 102 Mass. 445. *Fairbank* v. *Phelps*, 22 Pick. 535. *Vincent* v. *Cornell*, 13 Pick. 294.

But in the case at bar not only had Mrs. Bryant expressly agreed not to sell or mortgage the goods, but at the time of the mortgage to Stetson and of the sale by the defendant she was in default for the so called rent, and by the words of her agreement the plaintiffs had an immediate right of possession without demand or notice.

The plaintiffs have not contributed to the defendant's mistake, as in *Hills* v. *Snell*, 104 Mass. 173. There the plaintiffs, who were warehouse men, not owners of the goods in question, made the mistake of delivering the wrong man's flour to one who sold to the defendant, and it was held that they could not maintain trover after he had used it in good faith. It is sug-

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gested that the plaintiffs had constructive notice of the mortgage, and therefore should be deemed to have waived their rights. We do not see why, but it is enough to say that the plaintiffs had not the constructive notice supposed. Recording the mortgage did not affect them. *George* v. *Wood*, 9 Allen, 80, 83. *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489, 493. *Bates* v. *Norcross*, 14 Pick. 224, 231.

Judgment for plaintiffs.

SETH R. BAKER *vs.* NEWBERT J. HALL.

Suffolk. January 20, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Memorandum of Contract — Sketch — Oral Evidence — Specific Performance — Reasonable Time — Waiver of Defect in Deed.

The rule that, for the purpose of interpreting a document, the court may put itself in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the document, and the presumption that the words used to describe land in a contract to convey the same relate to land owned at the time by the vendor, are to be applied in interpreting a sketch which is part of a memorandum of contract for the sale of real estate.

A. brought a bill in equity against B. to enforce the specific performance of an agreement to purchase certain real estate on or before April 16, 1891. The agreement contained the statement, "provided a release cannot be obtained from present mortgagee to complete transfer as above, the interest shall be allowed said B. at the rate of five per cent per annum until such release is obtained from April 16th, 1891. Other terms and conditions remaining the same." *Held*, that the premises were to be conveyed on or before the day named, unless a release from the mortgagee to which the land was subject could not be obtained by that day, and that, in the latter event, the transfer was to be completed whenever, within a reasonable time, the release could be obtained.

A vendee of land, to be conveyed free of encumbrances, who absolutely refuses to accept performance of the contract of sale upon grounds other than the ground of a defect in the deed, cannot afterwards, in an action for the breach of his agreement to purchase, avail himself of any defect in the deed first tendered, a proper deed having been seasonably tendered to him.

BILL IN EQUITY, to enforce the specific performance of an agreement to purchase certain real estate. The answer alleged a tender of performance on the part of the defendant, and a failure on the part of the plaintiff to give a good title within the

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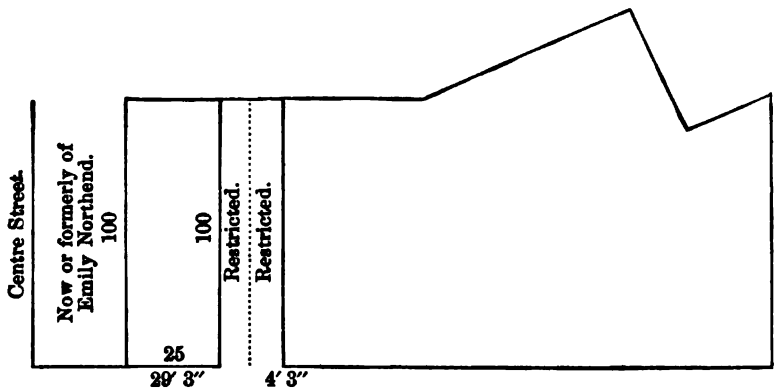
time specified, and also set up the statute of frauds. Trial in this court, before *Knowlton*, J., who reported the case for the determination of the full court, in substance as follows.

The plaintiff put in evidence an agreement between him and the defendant, dated March 11, 1891, the material portions of which are as follows:

"The party of the first part hereby agrees to sell, and the party of the second part to purchase, or cause to be purchased, a certain estate situated on Beacon Street in the town of Brookline in said Commonwealth and comprising twenty-nine hundred and twenty-five square feet of land with a frontage on said Beacon Street of twenty-nine feet and three inches, and one hundred feet deep, all as per sketch. On the easterly side of said lot, a strip of land



four feet and three inches is to be kept open forever for light, air, passage, and drainage, for the benefit of this lot, and for the grantor, his heirs and assigns, and the grantor agrees to restrict a strip of land four feet and three inches wide on his adjoining land for the uses as above of the first mentioned lot, and for himself, his heirs and assigns, agrees that the same shall always be kept open.

"Said premises are to be conveyed on or before April 16th, 1891, by a good and sufficient warranty deed of the party of the first part, conveying a good and clear title to the same free from all encumbrances except sewer assessments, and for such deed and conveyance the party of the second part is to pay the sum of eighty-six hundred and fifty dollars, of which three hundred dollars have been paid this day, seventeen hundred dollars are to be paid in cash upon the delivery of said deed, and the re-

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mainder is to be paid by the note of the party of the second part dated day of delivery of deed, bearing interest at five per cent per annum, payable in or within three months from date, and secured by a power of sale mortgage in the usual form upon the said premises.

"Provided a release cannot be obtained from present mortgagee to complete transfer as above, the interest shall be allowed said Hall at the rate of five per cent per annum until such release is obtained from April 16th, 1891. Other terms and conditions remaining the same. . . .

"The deed is to be delivered and the consideration paid at the registry of deeds in which the deed should by law be recorded, at twelve o'clock, noon, on or before the 16th day of April, 1891, unless the parties hereto agree in writing to some other time and place."

The plaintiff also put in evidence a deed from Emily J. Northend to Seth R. Baker, dated May 31, 1890, and duly recorded, the premises therein being described as follows, viz.:

"Situated in Brookline, being lot A and a part of lot B on a plan made by A. H. French, dated May 10, 1890, to be herewith recorded, bounded southerly on Beacon Street, two hundred and thirty-three hundredths feet; westerly on land now or late of Freeman, one hundred feet; northerly, on the remainder of said lot B by a line parallel with and distant one hundred feet northerly from Beacon Street, one hundred feet; westerly again on said lot B, forty-seven and ninety-one hundredths feet; northeasterly on land now or late of Selfridge, seventy-eight and twenty-eight hundredths feet; northwesterly on said land of Selfridge, thirty-two and twelve hundredths feet; northeasterly again on land of Griggs, forty-five and seventy hundredths feet; and easterly on said land of Griggs, sixty-three and eighty-four hundredths feet."

The plan referred to in this deed was put in evidence.

This plan, which is not referred to in the agreement of March 11, 1891, is given on the next page.

The plaintiff also put in evidence a deed of Emily J. Northend to Louisiana K. Freeman, dated June 21, 1889, conveying a lot of land described as follows, viz.:

"A certain lot of land situate on the northerly corner of

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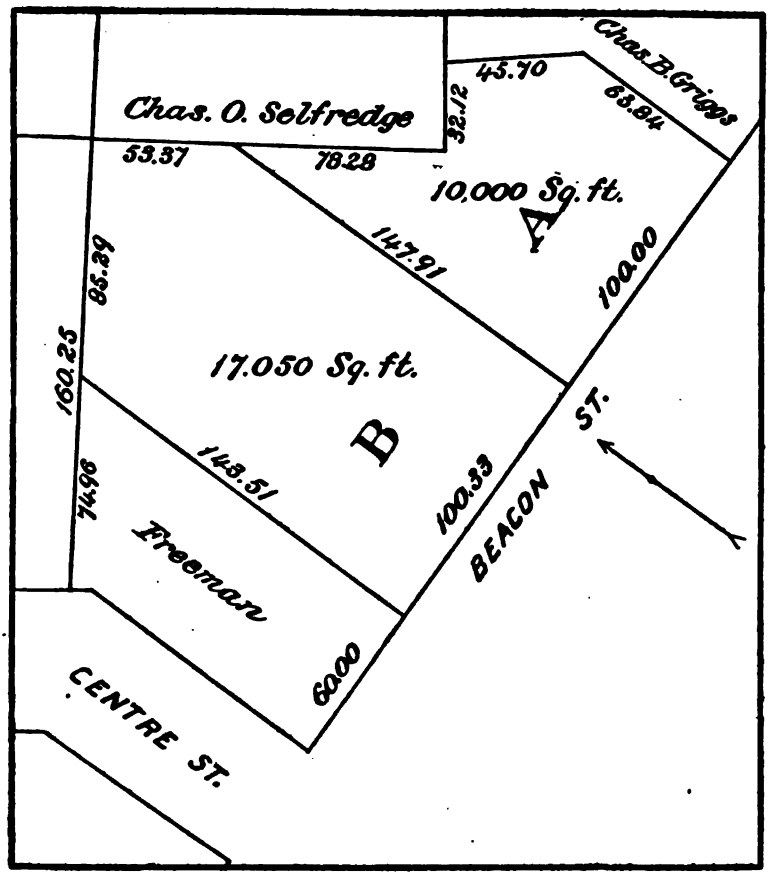

Beacon and Centre Streets in Brookline, commencing at the northeastern corner of Beacon and Centre Streets and running N. 3° 35′ 40″ E. ninety-six and $\frac{50}{100}$ feet by the easterly line of said Centre Street, thence N. 31° 15′ W. five and $\frac{5}{100}$ feet by the said easterly line of Centre Street, thence N. 60° 36′ 40″ E. seventy-four and $\frac{26}{100}$ feet, thence S. 3° 36′ 40″ W. one hundred and forty-three and $\frac{51}{100}$ feet to the northerly side of said Beacon Street; thence running westerly by the northerly side of Beacon Street sixty feet to the point begun at; containing seven thousand three hundred and eighty-nine and $\frac{78}{100}$ square feet more or less."

The deed of Baker to Freeman, dated October 14, 1890, was also put in evidence. The land therein conveyed was described as follows, viz.:

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"A parcel of land situated in Brookline, being a part of lot B on a plan made by A. H. French, dated May 10, 1890, recorded with Norfolk Deeds, bounded southerly on Beacon Street fifteen feet; westerly on land of said Freeman one hundred feet; northerly on land now or late of Bates fifteen feet; and easterly on other land of said Baker one hundred feet; containing fifteen hundred square feet. Being a part of the premises conveyed to me by deed of Emily J. Northend, dated May 31, 1890, . . . with the rights, easements, privileges, and appurtenances thereto belonging."

At the time of the agreement the plaintiff owned the lot so conveyed to him by Northend, except the strip conveyed by him to Freeman, as hereinafter described, (of which the premises to be conveyed to the defendant were a small part,) on which there were two mortgages, viz. a first mortgage of $30,000 to one Allen, and a second mortgage of $40,000 to one Andrews. There was evidence that the defendant was fully informed thereof, and also informed that it might not be possible to obtain a partial release of the first mortgage on the premises to be conveyed to him prior to April 16, and that, in consequence of this doubt, there was written into the agreement the following:

"Provided a release cannot be obtained from present mortgagee to complete transfer as above, the interest shall be allowed said Hall at the rate of 5% per annum until such release is obtained, from April 16, 1891, other terms and conditions remaining the same."

There was also put in evidence a deed from Seth R. Baker to Hannahetta C. Cogswell dated day of 1891, and acknowledged on April 16, 1891, by the grantor, before Henry W. Savage, a justice of the peace. The descriptive portion of the deed was as follows, viz.:

"A parcel of land situated in Brookline, being lot A on a plan made by A. H. French, dated April 3d, 1891, to be herewith recorded, bounded southerly on Beacon Street twenty-nine and twenty-five hundredths feet; westerly on land now or late of Freeman, one hundred and twelve hundredths feet; northerly on land now or late of Bates, twenty-nine and twenty-five hundredths feet; easterly on lot B on said plan by a line

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through the middle of a passageway one hundred and twenty-three hundredths feet.

"Being a part of the premises conveyed to me by deed of Emily J. Northend, dated May 31st, 1890.

"The passageway eight and fifty hundredths feet wide, shown on said plan, is to be forever kept open for light, air, drainage, and passage for the use of the owner and occupants of the granted premises, and the grantor, his heirs and assigns."

It was admitted by the defendant that the conveyance of the premises was to be made to Cogswell. It appeared also in evidence that the acknowledgment of said deed of Baker to Cogswell was made before the seals had been affixed thereto, and that the deed had never been reacknowledged.

It was also shown that on April 16 the defendant and Mrs. Cogswell met Mr. Robert F. Herrick, who was authorized to represent the plaintiff, by appointment to pass the papers; that she had with her the balance of the purchase money, to wit, $8,350, in cash, and she was ready and willing to take the deed of the land and pay the money, and so informed Mr. Herrick. He produced the deed of Baker to Cogswell, having no seals thereon, and also an assignment to himself of a second mortgage, given by Baker to one Andrews, dated February 17, 1891, on premises described as follows, viz.:

"A parcel of land situated in Brookline, bounded southerly on Beacon Street, 185 feet; westerly on land which I conveyed to Louisiana K. Freeman, 100 feet; northerly on land now or late of Bates, 85 feet; westerly on the same, $47\frac{91}{100}$ feet; northeasterly on land now or late of Selfridge, $78\frac{28}{100}$ feet; northwesterly on the same, $32\frac{12}{100}$ feet; northeasterly again on land of Griggs, $45\frac{70}{100}$ feet; and easterly on the same, $63\frac{84}{100}$ feet. Being a part of the premises conveyed to me by deed of Emily J. Northend, dated May 31, 1890, subject to a mortgage of $40,000."

The land conveyed by this mortgage included the land described in said agreement. He produced also a partial release, duly executed by himself, from the second mortgage given by Baker to Andrews of premises described as follows, viz.:

"A parcel of land situated in Brookline, being lot A in a plan made by A. H. French, dated April 3, 1891, to be herewith recorded, bounded southerly on Beacon Street, twenty-nine and

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twenty-five hundredths feet; westerly on land now or late of Freeman, one hundred and twelve hundredths feet; northerly on land now or late of Bates, twenty-nine and twenty-five hundredths feet; easterly on lot B in said plan by a line through the middle of a passageway, one hundred and twenty-three hundredths feet. Also the fee and soil in the whole of said passageway, subject to its use as a passageway for all the lots in said plan."

Mr. Herrick further stated, at this interview, that he was unable to procure a release of the first mortgage on the premises referred to in the agreement, as it had not been returned to him from the savings bank, or to produce a deed properly sealed on April 16. He also requested further time in which to pass the papers. The defendant refused to extend the time beyond April 16, and so notified the plaintiff.

There was evidence tending to prove that Mr. Herrick knew early in April that the Essex Savings Bank held the first mortgage, and that on April 12 he sent a partial release to the said savings bank for its execution; that owing to the treasurer's inability to obtain a meeting of the investment committee, this release was not executed till April 17. The premises covered by the release were as follows, viz.:

"Lot A on a plan made by Alexis H. French, dated April 3d, 1891, to be herewith recorded, bounded southerly on Beacon Street, twenty-nine and twenty-five hundredths feet; easterly on lot B on said plan by a line running through the middle of the passageway shown on said plan, one hundred and twenty-three hundredths feet; northerly on land now or late of Bates, twenty-nine and twenty-five hundredths feet; and westerly on land now or late of Freeman, one hundred and twelve hundredths feet. Also the fee and soil of the whole of said passageway, subject to its use as a street or way by the owners or occupants of lot A and B on said plan."

There was evidence tending to prove that on April 18 he called on the defendant at his office and tendered both of the releases, the assignment, and the deed of Baker to Cogswell, and "offered to pay him any interest on his money"; that the defendant replied that "the thing was all over, that he would have nothing to do with the property, that the time was gone by."

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It was further shown that on April 22 Mr. Herrick went to Dedham to make a tender, and looked all around the registry of deeds, waited fifteen or twenty minutes, and found no one. Due notice was given the defendant that he would be there to pass the papers.

The judge found as facts, that Mrs. Cogswell, to whom it was agreed the conveyance was to be made, was prepared on April 16 to take the conveyance and pay the balance of the purchase money; that she did everything that was to be done on her part or on the part of the defendant to consummate the transfer on that day; that the plaintiff on that day was not prepared to give a good title to the land; that the deed which he produced had no seals on it; that the defendant refused to extend the time for passing the papers beyond April 16, and so notified the plaintiff; that on April 18 the plaintiff was able to make a good title, and tendered the said deed, to which seals had been affixed, the two releases, and interest on the defendant's money; and that the defendant and Mrs. Cogswell refused to accept the same, or to have anything more to do with the estate. There was also evidence from which the judge found that the plaintiff could not by the exercise of reasonable diligence obtain a release from the mortgage on the property in time to enable him to give a good title prior to April 18, and that on that day and ever since he had been able, ready, and willing to give the defendant a proper deed of and a perfect title to the premises, and that he so informed the defendant; but the defendant refused to accept the property, alleging no other reason for his refusal than that the time for performance of the contract had expired.

No question was made that the description of the property in the deed and releases was according to the understanding of the parties, and was correct, if the contract was sufficient to answer the requirements of the statute of frauds. The reference to a plan in the description was made at the defendant's request, after a survey for the purpose of fixing the boundaries.

The want of seals on the deed was brought to the attention of the plaintiff's counsel at the interview on April 16, but was not referred to afterwards, and was never made a ground of objection to the acceptance of the title.

Against the objection of the defendant, the judge ruled that,

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by the terms of the agreement, if a release from the mortgages could not be obtained in time to complete the transfer on April 16, the plaintiff was entitled to a reasonable time after that date in which to complete it; that the description contained in the agreement was sufficient under the statute of frauds to warrant a finding in favor of the plaintiff; and that the fact that the deed was not sealed before it was acknowledged would not deprive the plaintiff of his right to equitable relief under the circumstances of the case; and found that he was entitled to a decree for specific performance of the contract.

The case was reported upon the questions of law involved. If the rulings were all correct, there was to be a decree for the plaintiff; otherwise, such order and decree as justice required.

D. C. Linscott, (*F. K. Linscott* with him,) for the defendant.

G. L. Huntress, (*H. Albers* with him,) for the plaintiff.

BARKER, J. 1. While the memorandum gives with precision the dimensions of the lot to be sold, and states that it was situated on Beacon Street, it does not sufficiently identify the land, unless by reference to the sketch. Without that reference, as the lot to be sold is part of a much larger parcel, there is not enough to indicate from what part of the whole it is to be taken, but its position is made certain, and the lot completely identified by the sketch.

For the purpose of interpreting the document, we may put ourselves "in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the memorandum"; *Farwell* v. *Mather*, 10 Allen, 322, 324; and we are also to presume that the words used to describe the land relate to land owned at the time by the vendor. *Hurley* v. *Brown*, 98 Mass. 545. The same presumption is, of course, to be applied in interpreting the sketch which is part of the memorandum. Applying these rules the sketch indicates with certainty that the land to be sold is the westerly end of the vendor's tract, and that it is separated from Centre Street by one lot only, which lot is the property of a third person. Centre Street is indicated on the west end of the sketch, and adjoining the street upon the east is a lot enclosed, except in the rear, by boundary lines, and marked "Now or formerly of Emily Northend." Another lot is indicated as adjoining on the east the one

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last mentioned, and it is clearly identified as the lot to be sold by its boundary lines and correct figures of dimension, and also by the two strips marked, "Restricted," on its easterly side. Adjoining the second restricted strip is a larger parcel enclosed in boundary lines. Without resort to extrinsic evidence, the fair interpretation of the sketch is that the land to identify which it was drawn is separated from Centre Street by one lot only, — a lot not owned by the vendor, because marked as "Now or formerly of" a third person, — and that it is located at the west end of the vendor's larger tract, of which it is a part. A resort to competent oral evidence would merely corroborate this interpretation of the sketch, by showing that the vendor did not own the one lot shown on the sketch as next to Centre Street; and that his land adjoined that lot on the east. Nor does the fact, which comes from extrinsic evidence, that all the land shown on the sketch was once owned by Emily Northend raise an ambiguity. The words, "Now or formerly of Emily Northend," are applied by the sketch to a single parcel only, and must be taken in the sense in which the phrase "now or formerly of" is commonly used in conveyancing; namely, as indicating that the parcel to which it is applied is a monument for the identification of other lands which are under description.

2. The defendant contends that the plaintiff is not entitled to relief because he was not in a condition to complete the conveyance on April 16, 1891. The decision of this question turns upon the construction to be given to the proviso annexed to the clause of the memorandum, fixing the day when the premises were to be conveyed. We are of opinion that the proper construction of the instrument is that the premises were to be conveyed on or before the day named, unless a release from the mortgages to which the land was subject could not be obtained by that day, and that in the latter event the transfer was to be completed whenever, within a reasonable time, the release could be obtained. See *Folsom* v. *McDonough*, 6 Cush. 208. The defendant relies upon the concluding sentence of the proviso, "other terms and conditions remaining the same," in support of his theory; which is that the transfer of title was to be made on the day named, whether the mortgage had been discharged or not, and that the only effect of the proviso would be to give to

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the vendee some allowance of interest, if the release had not been obtained. But the natural signification of the sentence is that the terms of the instrument other than those of the clause to which the proviso applied were to remain the same, and we cannot depart from the natural meaning when the result would be to compel one party to deliver a deed, the covenants of which would be at once necessarily broken, and the other party to pay in full for land mortgaged for much more than its price.

3. It is conceded that the deed without seals was not a good deed on April 16, 1891, but, as by the true construction of the memorandum the plaintiff had a further reasonable time in which to perform his agreement, that fact is not conclusive against him. When the deed had been sealed and was again offered, it was declined because the time had gone by, and with a declaration that the defendant would have nothing to do with the property. If, therefore, the fact that the deed when last offered had not been acknowledged since the seals were affixed made it defective, upon which we express no opinion, the defendant, having absolutely, and upon other grounds, refused to accept performance of the contract of sale, cannot now avail himself of the defect. *Wells* v. *Day*, 124 Mass. 38. See also *Scanlan* v. *Geddes*, 112 Mass. 15; *Linton* v. *Allen*, 154 Mass. 432, 438.

As the rulings of the presiding justice were all correct, according to the terms of the report, there is to be a

Decree for the plaintiff.

HERBERT E. DENNETT & another *vs.* EDMUND D. CODMAN & others.

Middlesex. January 20, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Foreclosure of Mortgage — Invalid Sale — Time within which to redeem.

An ordinary bill to redeem was brought, in which no peculiar relief was prayed for, and in which the accounts were taken and the amounts due determined without a suggestion that the plaintiffs were not ready to perform the offer contained in

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their bill, or that any peculiar form of decree was desired. The question was whether the decree should require the plaintiffs to redeem within a time stated, or should allow redemption "at any time before a valid and effectual foreclosure of said mortgage by a new execution of the power of sale therein, or otherwise." *Held*, that the decree being in the form usual in cases of the kind was proper, and that such a decree as the plaintiffs sought was without precedent.

BILL IN EQUITY, filed October 17, 1891, to redeem land from a mortgage in Belmont. The bill alleged that by a deed of mortgage dated September 15, 1888, and duly recorded, the plaintiffs conveyed to one John P. Dennett a certain parcel of land in Belmont; that the mortgage and note were subsequently assigned to one Robert Codman, Jr., who entered into a written agreement with the plaintiffs, dated July 1, 1890, to extend the mortgage and the time of payment of the note to September 15, 1891; that the mortgage and note were subsequently assigned to Edmund D. Codman, the present owner and holder; that the mortgage note matured on September 15, 1891, and default was made in payment; that upon September 19, 1891, "the defendant Codman caused to be published in the Belmont Bulletin, a weekly newspaper printed in the town of Watertown, and circulated to some extent in said Belmont, a notice to the effect that the real estate described in said mortgage, for breach of the condition thereof, would be sold at public auction in said Belmont on the twelfth day of October, 1891, at ten o'clock in the forenoon, under the power of sale contained in said mortgage; that on the twenty-sixth day of the same September, and on two subsequent days, the defendant Codman caused a similar notice to be published in said Belmont Bulletin, except that in said three subsequent notices said sale was advertised to take place upon the nineteenth day of October, 1891; and that no other notice or advertisement of said sale has been made except the said notices published in said Belmont Bulletin, and the plaintiffs believe, and therefore allege, that by publishing said notice as aforesaid of the sale to be held on October 12, and also of a sale to be held on October 19, confusion and uncertainty will be caused in the minds of intending purchasers as to the time when said sale will actually be held, and that by reason thereof persons who might otherwise attend and bid at said sale may be prevented from attending the same and bidding on said property."

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The bill further alleged that Alice H. Dennett, wife of Herbert E. Dennett, was the owner of the equity of redemption. The prayer was for an account and an injunction, and that, upon the plaintiffs' paying the defendant Codman the amount due, he might be ordered to release and discharge the mortgage. An injunction was issued on the day upon which the bill was filed, and on October 30, 1891, the injunction was dissolved, and the defendant Codman was "permitted to sell the property after such further notices and advertisements as are necessary reasonably to protect the interest of the mortgagor."

In their "motion to amend, and supplemental bill," the plaintiffs alleged that on October 31, 1891, the defendant Codman notified the plaintiffs that he should sell the real estate by public auction in Belmont on November 9, 1891, and the plaintiffs protested that there was not sufficient time between the entry of said order dissolving the injunction and November 9, 1891, to enable the defendant Codman to publish "such further notices and advertisements as were necessary reasonably to protect the interest of the mortgagor," as required by the terms of said order, and that the time and hour fixed for said sale were improper and unusual, and that the defendant Codman did not give reasonable notice of said sale, and did not act in good faith nor use due diligence in making said sale; and that the defendant Codman sold the property on November 9, 1891, subject to prior encumbrances, for a sum much less than its real value, and made to the purchaser a deed of the property in accordance with the mortgage sale. The prayer was that the purchaser and his grantee might be made parties defendant, that the mortgagee's sale might be declared void and set aside, and that the deed be delivered up and cancelled.

A decree was entered in this court by *Allen*, J., before whom the hearing was had, that the sale by the defendant Codman on November 9, 1891, be declared to be an invalid execution of the power of sale in the said mortgage, and the said sale be set aside so far as the same might otherwise affect the plaintiffs' right of redemption; that the plaintiffs be allowed to redeem within a time stated; that the purchaser's grantee reconvey to the plaintiffs; and that in default of payment within that time the bill should stand dismissed.

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The report stated that "the plaintiffs asked for a decree allowing them to redeem by paying the amounts found to be due 'at any time before a valid and effectual foreclosure of said mortgage by a new execution of the power of sale therein, or otherwise.' But I declined to enter the decree in that form, and inserted a provision in the decree, that, in default of such payment within the time fixed by the decree, the plaintiffs' bill should stand dismissed. The plaintiffs having entered an appeal from the decree, I make this report, by their request, of the question sought to be raised by the appeal, for the full court."

F. T. Benner, for the plaintiffs.

J. L. Thorndike, for the defendants.

KNOWLTON, J. The report in this case presents but the single question whether the decree should require the plaintiffs to redeem within a time stated, or should allow redemption "at any time before a valid and effectual foreclosure of said mortgage by a new execution of the power of sale therein, or otherwise." In the bill, the plaintiffs offer to pay the amount found due, and pray that an account may be taken, and that they may be permitted to redeem. The application is in the ordinary form of a bill to redeem, and the allegations in regard to the invalid sale do not change the nature of the proceedings, or give the plaintiffs any greater rights, or call for any further relief, than if no sale had been made. The decree is in the form usual in cases of this kind, and such a decree as the plaintiffs seek is, so far as we are aware, without precedent. *Stevens* v. *Miner*, 110 Mass. 57. *Dyer* v. *Shurtleff*, 112 Mass. 165, 166. *Briggs* v. *Briggs*, 135 Mass. 306. *Tetrault* v. *Labbé*, 155 Mass. 497. *Robertson* v. *Norris*, 1 Giff. 421. *Jenkins* v. *Jones*, 2 Giff. 99.

The statements and offer in the bill, as well as the prayer of it, imply that the plaintiffs are ready to redeem within a reasonable time. The only right which a mortgagor has under our statute, after a breach of the condition of the mortgage, is a right in equity to redeem. He may bring his suit, if he chooses, without having previously made a tender of payment. Pub. Sts. c. 181, §§ 21–27. On the bringing of the suit, it becomes the duty of the court to ascertain what sum is due on

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the mortgage, to fix the time within which payment shall be made, and to enter a decree that on payment within that time the plaintiff shall have possession of the premises and hold them discharged of the mortgage. Pub. Sts. c. 181, §§ 28–33. These provisions are applicable as well to mortgages with a power of sale as to those which contain no such power. *Way* v. *Mullett*, 143 Mass. 49. The mortgagor who elects to bring an ordinary bill to redeem waives all claim of right to have the property sold by the mortgagee under the power. Indeed, in a mortgage with a power of sale in the ordinary form, he has no such right. The power is inserted for the benefit of the mortgagee, to be exercised or not, as he sees fit.

It may well be that, if a sale has been made fraudulently, or in any such way as to be invalid against the mortgagor, he may bring a bill asking to have it set aside, and to be permitted to redeem at any time before the foreclosure of the mortgage by a valid sale, or by the expiration of three years and continued possession by the mortgagee taken and held on account of the breach of the condition of the mortgage. There might be equitable grounds for permitting the mortgagor to stand in the same position as if a fraudulent or unlawful sale had not been made, and for giving him a long time in which to redeem; but what order should be made on a petition asking peculiar relief in a case of that kind, it is unnecessary now to determine. It is enough, in the present case, to say that this is an ordinary bill to redeem, in which no peculiar relief is prayed for, and in which the accounts were taken and the amounts due determined without a suggestion that the plaintiffs were not ready to perform the offer contained in their bill, or that any peculiar form of decree was desired.

Nothing appears to indicate that the justice fixed a time shorter than was reasonable under the circumstances of the case, and no question in regard to that part of the decree is before us.

Decree affirmed.

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GEORGE A. DARY, administrator, *vs.* HENRY KANE.

Suffolk. January 23, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Bill to redeem Land from a Mortgage — Statute — Jurisdiction — Title of Administrator — Averment of Possession.

A bill to redeem land from a mortgage comes within the St. of 1883, c. 223, § 13, which provides that suits may be brought in any county where a transitory personal action between the same parties might be brought.

The interest and title of an administrator in and to an equity of redemption are sufficiently set forth in a bill to redeem, which, in this respect, follows as closely as possible the form enacted with the St. of 1883, c. 223.

In a bill in equity to redeem land from a mortgage an averment that the defendant's testate, who devised all his real estate to the defendant for a long time before his decease, and the defendant himself during all the time since the testate's decease occupied the premises without accounting for the rents and profits, sufficiently sets forth the defendant's possession.

BILL IN EQUITY, filed September 10, 1886. The bill alleged: 1. That by a deed of mortgage dated April 2, 1877, and duly recorded, the plaintiff's intestate, Susan Munnigle, conveyed to Margaret D. Davis, of Boston, in fee simple, a certain piece of land described, with the buildings thereon, in Cambridge; being the same premises conveyed to the said Susan Munnigle by the said Margaret D. Davis by deed of even date with said mortgage deed, and recorded therewith; subject to redemption, upon the payment by the said Susan Munnigle, her heirs, executors, administrators, or assigns, to the said Margaret D. Davis, her executors, administrators, or assigns, the sum of one thousand dollars, in five years from the date of said deed, with interest thereon at the rate of six per cent per annum. 2. That in 1878 Susan Munnigle died intestate, leaving as her only heirs at law and next of kin Catherine T. Tripp and the said Margaret D. Davis, and that on December 28, 1885, the plaintiff was duly appointed administrator *de bonis non* of the estate of the said Susan Munnigle. 3. That on July 28, 1885, Margaret D. Davis, who was then Margaret D. Kane, died testate, devising all her real estate to Henry Kane, her husband, who was appointed executor of her will. 4. That, as executor, Kane assigned the

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mortgage deed to George H. Davis, administrator of the estate of Charles C. Davis, and George H. Davis assigned the same to the defendant, Kane, by deed dated April 27, 1886, and duly recorded. 5. That default was made in the payment of principal and interest. 6. That Margaret D. Kane for a long time prior to her decease, and Henry Kane during all the time since her decease, occupied the premises, and neither of them ever accounted to the estate of Susan Munnigle for the rents and profits. 7. That on or about May 8, and again on May 20, 1886, the plaintiff requested the defendant, through E. B. Goodsell, his attorney, to render individually and as executor of Margaret D. Kane an account of the amount due on the mortgage, and of the rents and profits, but the defendant refused to do either. 8. That the value of said premises was greatly in excess of the amount due on the mortgage. 9. That the plaintiff offered to pay to the defendant what should be found due on the mortgage. 10. That at or about the time of making the request for an account, the plaintiff told the defendant, through his counsel, Mr. Goodsell, that he wished to pay the amount due on the mortgage if Kane would render him an account thereof, and that it was agreed that action on either side should be deferred till September of that year; but that Kane, before September and without notice to the plaintiff, caused a notice to be published in some newspaper, unknown to the plaintiff, that the premises would be sold for the purpose of foreclosing the mortgage on Saturday, September 11, at 10 o'clock A.M., and that the plaintiff had no actual notice of the intended sale till September 10.

The plaintiff prayed: 1. For an account of what was due to the defendant for principal and interest. 2. For an account of the rents and profits, and that the amount due be deducted from the amount due to the defendant for principal and interest. 3. For a decree that, upon the plaintiff paying to the defendant the sum (if any) found due upon the mortgage, the plaintiff should have possession of the premises discharged of the mortgage. 4. For an injunction forbidding a sale or conveyance.

The defendant demurred to the bill, because the bill was not brought in the court held for the county where the land referred to in the mortgage lay; because the plaintiff had not alleged, nor did it appear by the bill, that his intestate died seised or pos-

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sessed of the land referred to in the mortgage, of any equity of redemption therein, or of any right, title, or interest therein whatsoever, or that the right of redemption was in the plaintiff; because the plaintiff made it appear that it was necessary that the estate of the defendant's late wife, Margaret D. Kane, should be represented, but no legal personal representative of Margaret was named or made a party; and because the plaintiff had not stated any such case as entitled him to discovery or relief.

The demurrer was overruled; the case was referred to a master, to whose report no exceptions were taken, and a decree was entered, conformably to the master's findings, "that there is due to the defendant on said mortgage the principal sum of one thousand dollars, and the interest thereon at the rate of six per cent per annum from July 28, 1885; that the plaintiff shall pay to the defendant the sum of one thousand dollars and interest thereon, reckoned from July 28, 1885, to the date of said payment, at the rate of six per centum per annum, less the plaintiff's taxable costs, and that thereupon the defendant shall execute and deliver to the plaintiff a discharge of said mortgage."

The defendant appealed to this court.

E. B. Goodsell, for the defendant.

S. Hoar, for the plaintiff.

ALLEN, J. By St. 1883, c. 223, § 13, suits in equity may be brought in any county where a transitory personal action between the same parties might be brought. The defendant contends that a bill to redeem land from a mortgage does not come within this provision, and that it can only be brought in the county where the land lies. But such bill is clearly a suit in equity within the meaning of the statute. This is shown conclusively by the form enacted with the statute.

The interest and title of the plaintiff are sufficiently set forth in the bill, which in this respect follows the form enacted with the statute as closely as possible.

The averment of the defendant's possession is also sufficient.

The plaintiff as administrator of Munnigle's estate is accountable to Tripp as well as to the defendant, and for this reason the further objections of the defendant will not avail.

Decree affirmed.

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CHARLES ROSEBACK *vs.* ÆTNA MILLS.

Middlesex. January 24, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Personal Injuries — Negligence — Employers' Liability Act — Fellow Servants.

An ordinary weaver, whose usual work is merely to operate a loom, is not a person intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence within the meaning of the St. of 1887, c. 270, § 1, cl. 2, merely because it is also his duty, when his loom gets out of repair, to notify the loom fixer to put it in order. The weaver and loom fixer are fellow servants.

TORT, for personal injuries under the St. of 1887, c. 270. At the trial in the Superior Court, without a jury, before *Richardson*, J., there was evidence tending to show that the plaintiff, at the time of the injury complained of, was employed by the defendant to fix and repair a section of fourteen looms in the defendant's mill at Watertown whenever any of the looms were out of repair, and to inspect, fix, and repair any of the looms whenever notified so to do by the weaver operating any of them; that on April 3, 1891, one Rose McManus, an employee of the defendant, having operating, charge and control as weaver of one of the looms in the section assigned to the plaintiff to keep in repair, notified the plaintiff that her loom was out of repair and was making heavy cloth, and requested him to fix it; that McManus then went back to her loom, which was stopped, and began picking out the heavy cloth; that the plaintiff, in accordance with the request, within a minute or two thereafter, went to the loom and commenced to repair the same; that the only defect was, that the steel spring, with its nuts and bolts which held the friction band in place, had become loose, — a thing which not unfrequently happens, — and while the plaintiff was in the act of tightening up the spring, McManus was at the other side of the loom, facing the plaintiff, and within about two feet of him; and while so situated, and while the plaintiff was stooping down and had his hands and arms in the loom in process of tightening the spring, McManus started the loom into operation without notifying the plaintiff of

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her intention so to do, and without warning him of his danger, and by the act of said McManus the crank of the crank shaft of the loom suddenly revolved, and his left arm was caught, before the plaintiff could extricate it, between the crank and the iron casting to which the friction band of the loom was attached, and was seriously lacerated and crushed, one of the bones being broken and otherwise injured.

It appeared that there was no other defect in the loom than that which the plaintiff was called upon to repair or fix, and was in the act of fixing as aforesaid, and that the sole cause of the injury was the starting of the loom by McManus in the manner stated.

The judge ruled: 1. That on the evidence McManus did not have such superintendence of the plaintiff or his work as would entitle the plaintiff to recover in the action. 2. That McManus was a fellow employee of the plaintiff on the above stated facts, and that the defendant was not liable under the St. of 1887, c. 270.

It was admitted that due notice was given of the injury.

The judge found for the defendant; and the plaintiff alleged exceptions.

J. Hillis, for the plaintiff.

H. S. Webster & C. Reno, for the defendant.

BARKER, J. That an ordinary weaver, whose usual work is merely to operate a loom, is not a person "intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," within the meaning of the St. of 1887, c. 270, § 1, cl. 2, merely because it is also her duty, when her loom gets out of repair, to notify the loom-fixer to put it in order, is too plain for discussion. The weaver was no more than the plaintiff's fellow servant, and the rulings were right.

Exceptions overruled.

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ROBERT C. SOPER *vs.* JEROME F. MANNING.

Middlesex. January 24, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Summary Petition to vacate Judgment — Dismissal of Previous Petition no Bar — Objections to Allegations — Evidence.

A general request to rule that a petition to vacate a judgment is insufficient in form, is entitled to no more favorable consideration than a demurrer, which must point out any defect of technical accuracy of allegation relied upon.

It is no bar to a petition to vacate a judgment that a previous petition was dismissed without prejudice, by reason of certain formal defects and not upon the merits.

Technical objections to the form of allegations cannot be taken by objecting to evidence in support of them.

The refusal of the Superior Court to continue a case in order to enable one of the parties to examine the clerk of that court, who was not in the court-house at the time and was not summoned as a witness, is not open to exception.

Where there is evidence of sufficient cause for a review, this court cannot revise the finding or the discretion of the justice of the Superior Court.

PETITION on the Pub. Sts. c. 187, §§ 17, 19, to vacate a judgment of the Superior Court obtained by the respondent against the petitioner on default.

At the trial in the Superior Court, before *Braley*, J., the respondent contended, and asked the court to rule, that the petition was insufficient in form. The court refused so to rule, and the respondent excepted.

It appeared that the petitioner, Soper, was sued jointly and severally with four other persons, by a writ in favor of the respondent, dated May 18, 1888, issuing out of the Superior Court. All of the defendants except the petitioner appeared in the original action by counsel, and filed answers. Soper appeared for himself, but did not file any answer. The case never was placed on the trial list for trial. On December 21, 1891, there was, after notice, a copy of which was sent to the respondent, a general call of the entire docket by the court. The petitioner, Soper, was not present at that time, nor did it appear that he had any notice of the calling of the docket. The other defendants were represented by counsel. On that date the action was dismissed, without costs, against all the defendants except the petitioner.

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Counsel for the other defendants was present, who became counsel of record for the petitioner.

It was admitted that the petitioner, at the March sitting for 1892, brought a petition to vacate the judgment, which petition, after a hearing, was dismissed without prejudice, for formal defects and not upon the merits. The respondent asked the court to rule that this was a bar to the maintenance of the present petition. The court refused so to rule, and the respondent excepted.

At the trial of this petition the petitioner offered in evidence a certified copy of the record of the case of Samuel T. Soper and others, including the plaintiff, against Jerome F. Manning and another, being a bill in equity brought in the Supreme Judicial Court for the County of Suffolk, and claimed that it appeared by examination of the record that the professional services sued for by Manning in his suit at law against the petitioner, the judgment in which case is now sought to be vacated, had been fully adjusted, as between said Manning and the petitioner, in the suit in equity. It was agreed that the record might be referred to at the argument by either party. To the admission of this record the respondent objected; the court admitted it, and an exception was taken.

The petitioner testified that he knew that the suit at law of Manning against himself was pending; that he had requested his uncle, Samuel T. Soper, to attend to it for him, and supposed that it was being properly looked after, and did not give himself any further concern about the matter, and that during the time while the action was entered and pending he was absent on a voyage at sea; that when he came back he stayed in Boston for a short time, and then went to the State of New York; that the litigation in the action at law he supposed was a part of the litigation which arose in the bill in equity, and that in that case his uncle had managed and looked after the interests of all concerned, including the retaining of counsel, said Samuel T. Soper being one of the defendants in the suit at law, and also one of the plaintiffs in the suit in equity; that he did not owe the respondent Manning anything; and that the suit in equity had fully litigated all claim for services on the part of Manning against him.

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The petitioner also put in a letter from his uncle, received soon after its date, December 26, 1890, which letter stated: "The way I understand it, the owners of the Mermaid are sued by Manning, and that takes you as well as me, and if it is not defended we shall go by default."

He further testified that he intended to file an answer and defend the action, and that he supposed that everything necessary to be done for the purpose of protecting his rights had been done; that if he had not so supposed, he should have at once retained counsel and personally investigated the matter himself; that he was not aware of the default until notice was given him of the execution that issued upon the judgment by the party in whose hands it was placed for collection against him, and was at that time in the State of New York, and that thereupon he took immediate steps to endeavor to get the judgment vacated.

The respondent at the hearing desired to call the clerk of the Superior Court as a witness as to what transpired at the time when the suit at law of Manning against the petitioner was dismissed, and to explain certain memoranda made by him as clerk on the docket of said court with reference to the entry of the dismissal of the cause; but it appeared that the clerk was not in the court-house at the time, but had gone to his home at Winchester, and had not been summoned as a witness. The judge refused to continue the case, and ordered the respondent to proceed with his defence, to which order the respondent excepted.

The respondent offered no evidence, and asked the judge to rule, that on all the evidence, and upon the allegations set out in the petition, the petition should be dismissed. The court declined so to rule, and found that the judgment entered in the case of *Manning* v. *Soper* was entered upon a default suffered by mistake, and that Soper did not intend to make default, and had a good defence on the merits to the action, and ordered the judgment vacated, and the cause brought forward on the docket, and to stand for trial; and the respondent alleged exceptions.

J. F. Manning, pro se.

N. W. Ladd, for the petitioner.

HOLMES, J. This is not a writ of review, but the summary proceeding to set aside a judgment in an action in which "the

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execution has not been satisfied in whole or in part," given by Pub. Sts. c. 187, §§ 17–19. *Skillings* v. *Massachusetts Benefit Association*, 151 Mass. 321, 322. This fact makes a part of the respondent's argument, based on the sections and decisions relating to writs of review, inapplicable.

1. The first exception is to the refusal of a general request to rule that the petition was insufficient in form. No particular defect was pointed out, and such a request is entitled to no more favorable consideration than a demurrer, which, it is settled, must point out any defect of technical accuracy of allegation which is relied upon. *Windram* v. *French*, 151 Mass. 547. *Train* v. *Boston Disinfecting Co.* 144 Mass. 523, 525. The only defects suggested are of the most minutely technical sort. We do not mean to imply that the petition was not sufficient in form. Certainly it was so in substance.

2. The fact that a previous petition had been dismissed without prejudice, by reason of certain formal defects, and not upon the merits, was not a bar to the present one. *Hayes* v. *Collins*, 114 Mass. 54.

3. If the allegation that the claim which was the foundation of the judgment was settled and finally adjudicated in the case of *Soper* v. *Manning*, 147 Mass. 126, would have been open to objection as too indefinite even for a summary proceeding like this, if the objection had been made at the outset, it nevertheless gave notice of the substantive fact relied on, and entitled the petitioner to introduce a certified copy of the record to prove it. Technical objections to the form of allegations cannot be taken by objecting to evidence in support of them. *Capron* v. *Anness*, 136 Mass. 271, 272. Some criticisms are made on the record, but that is not before us.

4. No exception lies to the refusal of the court to continue the case in order to enable the respondent to examine the clerk, whom he had not summoned as a witness. *Kittredge* v. *Russell*, 114 Mass. 67. *Pickering* v. *Reynolds*, 111 Mass. 83.

5. There was evidence of sufficient cause for a review. We cannot revise the finding or the discretion of the Superior Court. *Boston* v. *Robbins*, 116 Mass. 313. *Keene* v. *White*, 136 Mass. 23.

Exceptions overruled

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ELLA A. JONES & another *vs.* BYRON R. MITCHELL & another.

Suffolk. January 25, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Conveyance of Real Estate — Attachable Interest.

A. on September 1, 1890, conveyed real estate to B. who gave A. a writing agreeing to reconvey it when a complaint against A. was disposed of, B. having become surety on a bail bond issuing in the case. The complaint was disposed of on October 3, 1890. On January 22, 1891, at ten o'clock and fifty minutes in the forenoon, B. recorded the deed to him from A. in the registry of deeds, but the writing given by B. to A. was never recorded. On the same day at ten o'clock and forty minutes in the forenoon, C., a deputy sheriff, made an attachment in favor of D. of all B.'s real estate in the county; and at twelve o'clock and twenty-seven minutes in the afternoon deposited in the registry a copy of the writ, with so much of his return as related to the attachment. On March 19, 1891, B. reconveyed to A., and on the same day A. executed a mortgage of the real estate to E. Subsequently D. recovered judgment against B., and C. made a levy on the land by virtue of an execution. *Held*, on a bill in equity by A. and E. against C. and D., to enjoin them from disposing of the property, that B., at the time when the attachment was made, had no record title to the land and no attachable interest therein.

BILL IN EQUITY, praying that the defendants, Mitchell and Lindsay, be restrained from disposing in any way, by sale or otherwise, of the real estate described in the bill. Trial in the Superior Court, before *Dunbar*, J., who reported the case for the consideration of this court, in substance as follows, such decree to be entered as should seem proper.

Martha A. Davis was seised in fee of the real estate named in the plaintiff's bill, from March 11, 1884, until the day of the conveyance by her to Henderson J. Edwards, hereinafter mentioned. In September, 1890, she was under arrest upon a complaint charging her with a criminal offence, and desired to be released on bail. To enable Edwards, who was without property, to act for her as surety upon a bail bond, a conveyance of this land was made by her to him, the deed bearing date of September 1, 1890. It was recorded in the proper registry of deeds on January 22, 1891, at ten o'clock and fifty minutes in the forenoon. Subsequently Edwards became surety for Davis upon a

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bail bond or recognizance, and she was released from custody on bail. At the time of this conveyance to Edwards, he executed and delivered to her an instrument in writing, in which he agreed to reconvey the land to her when the complaint against her should be disposed of. This paper was never recorded, and the defendants never had any notice of its existence. It was not produced at the trial. On October 3, 1890, upon the hearing of the complaint, Davis was discharged by the Police Court of the city of Somerville, which had cognizance thereof.

On said January 22 the defendant Mitchell brought an action at law against Edwards, and on the same day, at ten o'clock and forty minutes in the forenoon, the defendant Lindsay, a deputy sheriff, made an attachment on the writ of all Edwards's interest in and to any and all real estate in the county of Middlesex; and at twelve o'clock and twenty-seven minutes in the afternoon of said January 22 Lindsay deposited in said registry a copy of the writ, with so much of his return thereon as related to such attachment.

On March 16, 1891, Edwards executed, acknowledged, and delivered a release of his interest in the land to Davis, which contained the following statement: "The above estate having been placed in my name, September 1, 1890, by said Martha A. Davis, as security to protect me on a bond which I signed on that date for said Martha A. Davis, said bond having been discharged, I therefore make this reconveyance." This release contained no release of dower, and was not signed by the wife of Edwards, and on March 19, 1891, he executed, acknowledged, and delivered to Davis a quitclaim deed of all his interest in said land, which contained a release of dower, and was signed by his wife. Both these last named deeds were recorded in the proper registry of deeds on said March 19.

On June 26, 1891, the defendant Mitchell recovered judgment in the action at law against Edwards for $889.65 damages, and $18.69 costs of suit. On July 11, 1891, execution was issued and placed in the defendant Lindsay's hands, and on July 24, 1891, he made a levy on the land by virtue of the execution.

On said March 19, Davis executed, acknowleged, and delivered to the plaintiff Jones a mortgage of the land to secure a note for $625 and interest, signed by her and payable to the

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plaintiff Jones, and the latter lent to her the sum represented by said note.

This mortgage was recorded in the proper registry of deeds on the same day, to wit, March 19, 1891. From the delivery of the deed from Davis to him, until the delivery of the deed from him to Davis, Edwards had the legal title to the land, but he had no beneficial interest therein after the discharge of Davis by the Police Court, on October 3, 1890; and after the last named date he held it upon a naked trust, to reconvey the same to her upon demand, but neither of the defendants had any notice of such trust prior to the filing of the plaintiffs' bill, except the recording of the release from Edwards to Davis above mentioned.

C. W. Bartlett & E. R. Anderson, for the plaintiffs.

B. Morse, for the defendants.

LATHROP, J. The attachment in this case was made on January 22, 1891, at forty minutes after ten o'clock in the forenoon, and on the afternoon of the same day, at twenty-seven minutes after twelve o'clock, a copy of the writ was deposited in the registry of deeds. Between these times the deed from Davis to Edwards was recorded. The defendants, who claim under the title derived from the attachment, contend that the attachment did not take effect until the copy of the writ was deposited in the registry of deeds. But as the copy of the writ was deposited within three days, it took effect by the express words of the statute, from the time it was made. Pub. Sts. c. 161, § 65. The last clause of this section relates only to the case where there is a sale to a purchaser, in good faith, after the attachment and before the deposit in the registry of deeds; and it has no application to the case at bar.

At the time the attachment was made, Edwards had no record title to the land in question. It is true that he had an unrecorded deed, but in fact he held this only as security, and he had given to his grantor an agreement to reconvey the land when a criminal complaint against her was disposed of. This complaint had been disposed of long before the attachment. Taking the two instruments together, Edwards had no attachable interest in the land. If the defendants are permitted to avail themselves of one unrecorded instrument, there is no reason why the plaintiff Jones should not have the benefit of the other. The case is governed

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on this point by *Cowley* v. *McLaughlin*, 141 Mass. 181, 182, where it was said by Mr. Justice Holmes: "But when the registry shows no title, and the creditor does not know that his debtor has one, which we must assume to have been the fact here, if it be in any way material, we think that he must take what accident throws into his net as he finds it; and that he cannot claim the benefit of a fiction to get more than his debtor really owned."

In *Clark* v. *Watson*, 141 Mass. 248, on which the defendants rely, the deed to the debtor was recorded before the attachment.

Decree for the plaintiffs.

MARY E. CLARK *vs.* JOHN B. PATTERSON & others.
STEPHEN G. CONDIT *vs.* SAME.

Suffolk. January 26, 27, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Loan by Married Woman to Husband — Presumption — Insolvent Estates — Claim against Firm Assets — Note given to Wife by Husband's Firm — Dismissal of Bill in Equity.

If a wife places in her husband's hands her separate property, the presumption, in the absence of evidence that he receives it in trust for her, or of fraud practised upon her, is that he can use it as his own.

If a married woman lends property to her husband and takes from him an obligation indorsed by his partner, the obligation is provable, if at all, only against the separate assets of the insolvent estates of the signers, and she has no claim against the assets of the firm.

A note given to a wife by a partnership of which her husband is a member is void as between the original parties, and equity cannot afford relief.

If the plaintiff in a second bill in equity does not seek relief, if the first bill is dismissed, then, on the first bill being dismissed, the second is rightly dismissed also.

LATHROP, J. The first case is a bill in equity against John B. Patterson, Michael J. Sughrue, Stephen G. Condit, and the Broadway National Bank. The case was heard on the merits in the Superior Court, and a decree was entered dismissing the bill. From this decree the plaintiff appealed; and the case comes before us on the pleadings and a report of the evidence taken in the court below. Most of the facts of the case are not in dis-

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pute, while as to others there is a controversy. We find them to be as follows.

In May, 1890, Linus E. Clark, the husband of the plaintiff, entered into partnership with the defendant Patterson. By the terms of the articles of copartnership, Clark agreed to contribute to the partnership the sum of one thousand dollars in cash. Clark had no money, but said to Patterson that he had a bond, on which he could realize the money. The bond in question was for the sum of one thousand dollars, and was issued by a water company, and was payable to bearer. It belonged to the plaintiff, and she lent this bond to her husband, and took from him an instrument in writing of the following tenor: "$1000. Boston, May 5, 1890. For value received, pay to the order of Mary E. Clark, one thousand dollars. Value received, and charge the same to account of Linus E. Clark. To Mary E. Clark." This instrument was indorsed in blank by the defendant Patterson, by writing his own name upon it. With this bond as collateral security, the defendant bank lent the firm of Patterson and Clark the sum of one thousand dollars, payable on demand, and took the firm note therefor.

On August 5, 1890, the plaintiff lent her husband a coupon bond of another water company, payable to bearer, for one thousand dollars. She received therefor from her husband the promissory note of the firm of Patterson and Clark, for the sum of one thousand dollars, payable to her order, on demand. With this bond as collateral security, the firm of Patterson and Clark borrowed of the defendant bank the sum of eight hundred dollars, and gave its promissory note therefor. The bank had no notice of the plaintiff's interest in either bond. Some time after the latter transaction with the bank, the firm of Patterson and Clark failed, and, on September 29, 1890, executed an instrument of assignment to the defendant Sughrue of all their assets, in trust for the creditors of the firm who should become parties thereto. This instrument authorized the assignee, among other things, "to sell and dispose of all the trust property as by him deemed wise, and to collect or sell choses in action, using a reasonable discretion as to the times and modes of selling and disposing thereof, for cash or on credit, at public or private sale."

When Patterson and Clark failed, the plaintiff made claim for the amount of the two instruments delivered to her by her hus-

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band, and wished to assent to the instrument of assignment as a creditor, and did what she could to become a party thereto. She was told by the assignee that by the laws of this Commonwealth such a claim was not authorized, and was advised to employ counsel. She did employ counsel, who advised her that she had no claim on the assets of the firm. On October 10, 1890, with the advice and consent of her counsel, she signed the following paper: "It is agreed that the bonds held by the Broadway National Bank may be sold by said bank at private sale, and the proceeds, after payment of the bank's claim, may be held by the bank and paid to whomsoever is entitled thereto as soon as same may be determined or settled. This agreement is understood to be without prejudice to the rights or titles of either party."

The bank did not become a party to the assignment; and, on November 29, 1890, sold the bonds, under a power of sale contained in the notes, for about eighteen hundred dollars. It does not appear that there was any surplus after satisfying the claim of the bank.

On October 25, 1890, the defendant Condit, who was the largest creditor of the firm, bought of the assignee all the assets of the partnership, and agreed in writing "to compromise, assume, or pay all claims and demands against the partnership of Patterson and Clark." At the time he entered into this agreement, he was informed by the assignee that all the claims he had to settle were the claims against the firm for merchandise, and that he had nothing to do with the bonds held by the bank, or with the claims of the present plaintiff.

The bill in the second case is brought by Condit against Patterson, Sughrue, Clark and his wife, and the Broadway National Bank. It proceeds on the ground that, if the court shall hold that the plaintiff is bound to Mrs. Clark, by reason of the agreement entered into between the plaintiff and Sughrue, the agreement was entered into through a mistake of law and fact. The prayer of the bill is that, on his delivering up the assets received by him, the agreement may be cancelled. This bill was dismissed by the Superior Court, on the ground that the plaintiff stood in no need of equitable relief, as the bill in the first case had been dismissed. From this decree the plaintiff appealed to this court, in order that the whole matter might be before the court.

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We proceed to consider the claims made by the plaintiff in the first case. She contends that she never parted with her property in the bonds; that they were merely lent by her to her husband; and that a trust was imposed upon the bonds in her favor. It was held in *Jacobs* v. *Hesler*, 113 Mass. 157, that if a wife places in her husband's hands money that is her separate property, the presumption, in the absence of evidence that he receives it in trust for her, is that he can use it as his own. See also *Brown* v. *Wood*, 121 Mass. 137. We find nothing in the case at bar to warrant us in deciding that the bonds were received by the husband in trust for the plaintiff, or anything to rebut the presumption that he was at liberty to use the bonds as he pleased. Nor do we find any evidence of fraud practised upon her. See *Thacher* v. *Churchill*, 118 Mass. 108.

The next contention of the plaintiff is that, if she has no property in the bonds, she has a claim against the partnership on the two instruments given her at the times the bonds were handed over by her. The first instrument, whether it be styled a draft or a note, was not an undertaking by the firm. It was at most an undertaking by one member of the firm indorsed by the other; and, if provable at all, would be only against the separate assets of the signers. There were no separate assets in this case; and the plaintiff can have no claim against the firm assets on account of this instrument.

As to the second note, it was void as between the original parties, being given to a wife by a partnership of which her husband was a member. *Kenworthy* v. *Sawyer*, 125 Mass. 28, and cases cited. Nor does equity afford relief in such a case. *Fowle* v. *Torrey*, 135 Mass. 87. See also *Kneil* v. *Egleston*, 140 Mass. 202. It was, moreover, decided in *Woodward* v. *Spurr*, 141 Mass. 283, that a wife was not entitled to prove, against the estate of her husband in insolvency, a claim for money lent by her to him from her separate estate, and used by him in his business, and for which she held his promissory note, notwithstanding the St. of 1884, c. 293, providing for the proof of equitable liabilities against insolvent estates.

It follows from these cases that the plaintiff was not entitled to prove against the assets of the partnership, and that the decree below, dismissing the bill, was correct.

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In the second case, as the plaintiff does not seek relief, if the bill in the first case is dismissed, the decree below is correct.

Decrees affirmed.

L. M. Child, for the plaintiff, Mary E. Clark.

A. F. Means & J. Lowell, for Patterson and Condit.

G. L. Huntress, for Sughrue.

WILLIAM F. LAWRENCE, trustee, *vs.* MARY A. CRANE & others.

Suffolk. January 26, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Will — Devise and Legacy — "Heirs at Law" — Wife as Heir of Husband.

After giving the rest and residue of the testator's property and estate, real, personal, and mixed, to trustees, in trust to manage the same and make and deliver all deeds proper to invest the purchasers with good titles, "and using the proceeds of all such sales for the purpose hereinafter described," the will provided: "When my estate shall finally be disposed of by my said trustees, or the survivor of them, and all collections made that can be made, then my said trustees, or the survivor of them, shall dispose of the net proceeds in their hands by dividing the same among my heirs at law as provided for by the laws of the Commonwealth of Massachusetts. Payments on account of the first settlement I hereby authorize to be made to my wife, daughter, and son." *Held*, that the fact that the estate was to be turned into personalty and the proceeds divided among the heirs at law showed that by those words were meant those entitled to succeed to personal estate in case of intestacy; that the last provision as to payments could not be explained except by assuming that the wife was to share as an heir at law with the daughter and son, as provided for by the laws of the Commonwealth; and that this view was confirmed by looking at the earlier parts of the will, in which the testator three times spoke of his "beloved wife," and by the fact that, if she was not to be included, she would be cut off with a scanty allowance, much less than she would be entitled to by law.

ALLEN, J. The bill asks for instructions merely as to the proper disposition of the sum of $13,850, being the residuary estate after payment of debts and the charges of administration up to this time. This sum is held in money by the plaintiff, as trustee, and it always has been money in his hands, except when temporarily lent by him on interest. The particular provisions of the will under which the money is held are as follows

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In article 9, after giving the rest and residue of his property and estate, real, personal, and mixed, to trustees, in trust to manage the same, and make and deliver all deeds proper to invest the purchasers with good titles, "and using the proceeds of all such sales for the purpose hereinafter described," the will says: "When my estate shall finally be disposed of by my said trustees, or the survivor of them, and all collections made that can be made, then my said trustees, or the survivor of them, shall dispose of the net proceeds in their hands by dividing the same among my heirs at law as provided for by the laws of the Commonwealth of Massachusetts. Payments on account of the first settlement I hereby authorize to be made to my wife, daughter, and son."

The question is whether the testator's widow is to be considered as one of his heirs at law, within the meaning of the will.

It might be suggested that these words should be construed to mean that real estate should go to those entitled by law to real estate, and personal estate to those entitled by law to personal estate. But it seems more reasonable to hold that only one set of persons was intended, as in *Lincoln* v. *Perry*, 149 Mass. 368, and *Fabens* v. *Fabens*, 141 Mass. 395. If this is so, although at present we are only asked as to the disposition of personal estate, we can hardly avoid considering the disposition of the proceeds of the real estate also.

A devise of real and personal estate to heirs at law, especially when they are to take in their own right and not as substitutes for their ancestor, will ordinarily be held to mean those who would be entitled to succeed to real estate in case of intestacy. *Proctor* v. *Clark*, 154 Mass. 45. But this construction will yield if the whole will shows a different intention. When it is contemplated that real estate shall be changed into money before going to the heirs at law, then those words are held to mean those entitled to succeed to personal estate in case of intestacy. *Kendall* v. *Gleason*, 152 Mass. 457. *White* v. *Stanfield*, 146 Mass. 424. Such an intention is manifested in the present will. The estate is to be turned into personal property, and the proceeds divided. Moreover, the provision that payments on account of the first settlement are authorized to be made to the

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testator's wife, daughter, and son cannot be explained except by assuming that the wife was to share as an heir at law with the daughter and son, as provided for by the laws of the Commonwealth of Massachusetts. This view is further confirmed by looking at the earlier parts of the will, in which the testator three times speaks of his "beloved wife," yet, if she is not to be included in the residuary bequest, she is cut off with a scanty allowance, much less than she would be entitled to by law.

It therefore seems to us that she was intended to be included.

Decree accordingly.

E. B. Hale & F. E. Dickerman, for Mary A. Crane.

M. Storey & J. L. Thorndike, for H. Bella Jones.

F. C. Welch, for Emily L. Pratt and Mary E. Pearson.

EDWARD LYNCH *vs.* UNION INSTITUTION FOR SAVINGS & another.

Suffolk. January 27, 1893. — March 8, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Eviction of Sublessee — Damages — Injunction.

On a bill in equity to restrain a threatened eviction of the plaintiff by the owner of the fee, it appeared that the plaintiff was a sublessee under a lease assented to by the defendant's predecessor in title and binding on the defendant; that it would not expire for over three years from the filing of the bill; and that the plaintiff had been injured and was threatened with complete eviction when the bill was filed. *Held*, that the plaintiff should not be confined to recovering damages on the ground that the injury of an injunction to the owner would be incommensurate with the benefit to the plaintiff, and that an injunction should issue.

HOLMES, J. This is a bill in equity, April 16, 1892, to restrain a threatened eviction of the plaintiff by the owner of the fee. The plaintiff is a sublessee, who is found to be in under a lease which was assented to by the predecessor in title of the defendant Institution for Savings, and which is binding on that Institution. It does not expire until the end of November, 1895. The mesne lease has been surrendered. We are to take it that

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the plaintiff had been injured, and that he was threatened with complete eviction when the bill was filed. The only question intended to be presented by the report is whether the injunction should be denied, and the plaintiff confined to recovering his damages, on the ground that the injury of the injunction to the owner would be incommensurate with the benefit to the plaintiff.

The result of denying the injunction is to "allow the wrongdoer to compel innocent persons to sell their right at a valuation." *Tucker* v. *Howard*, 128 Mass. 361, 363. The decision in *Brande* v. *Grace*, 154 Mass. 210, is not an authority for that. There the defendant corporation built a structure on its own land after a decision by the Superior Court that it had a right to do so. When the plaintiffs' lease had but eight months more to run, this court decided that the structure was unauthorized, because it interfered with an implication in the lease that the rooms should continue to open on Tremont Street; but an injunction was refused in view of the early termination of the lease. In the present case the plaintiff's lease has a year and nine months to run. The defendant Institution for Savings is not interfering with a doubtful easement under a mistaken view of its rights. Now, at all events, if not from the beginning, it simply is dispossessing or trying to dispossess a man of his land by wilful wrong, and its argument that it should not be restrained in proceeding must be that it can make more money out of the plaintiff's property than the plaintiff can, if it is allowed to take it. See *Goodson* v. *Richardson*, L. R. 9 Ch. 221, 224.

If we are to infer, although it does not appear with definiteness, that the defendant Institution has been at some expense already on the plaintiff's premises, we see no reason to doubt that it has acted with knowledge of the plaintiff's rights. What it has done outside of the plaintiff's premises, and not interfering with him, is no concern of his. The defendant Institution's outlay does not better its case on the question of a prohibitory injunction, and we see no reason why it should not be required to restore the premises to their original condition. See *Tucker* v *Howard*, 128 Mass. 361.

Injunction to issue.

S. L. Whipple, for the plaintiff.

M. Morton, for the Union Institution for Savings.

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GEORGE C. ABBOTT *vs.* WILLIAM S. HILLS & others.

Suffolk. January 27, 30, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Covenant of Warranty — Dedication of Land as Public Park — Right of Assignee to sue.

A bill in equity was brought upon a covenant of warranty in a deed under which the plaintiff obtained title, which deed was executed by six grantors to two of their number, in trust, whenever required by a majority of the grantors, to convey by deed "containing a warranty against all persons claiming under them as trustees under this deed." The covenant in suit was that of the grantors to warrant and defend the premises "to the said grantees, the survivors of them, their successors and assigns for the purposes aforesaid." The trustees conveyed to a corporation, with the limited covenants provided for by the words quoted. The corporation having conveyed a part of the tract to the plaintiff, it was alleged that two parcels had been dedicated to the public as public parks by the six grantors before the delivery of their deed, and that the plaintiff had been evicted by a former decree of this court. *Held*, on demurrer, that a covenant by several with two of their number will not be enforced at law; that although a covenant of warranty running to the grantee, his heirs and assigns, can be sued upon by the assignee in his own name, still it does not operate as a letter of credit offering a new covenant to whoever will take the land on the faith of it; that the assignee stands as successor to the original covenantee, and takes the original covenant with all its manifest infirmities, and that the covenant sued upon was confined to the trustees and their successors in the trust.

HOLMES, J. This is another suit arising out of the controversy which was before the court in *Attorney General* v. *Abbott*, 154 Mass. 323. See also *Abbott* v. *Cottage City*, 148 Mass. 521. It is a bill in equity brought upon a covenant of warranty in a deed under which the plaintiff gets his title. The deed was executed by six grantors, Darrow, Collins, Norton, Bradley, Carpenter, and Hills, to Norton and Darrow, two of their number, in trust, whenever required by a majority of the grantors, to convey by deed "containing a warranty against all persons claiming under them as trustees under this deed." The grantors covenant to warrant and defend the premises "to the said grantees, the survivors of them, their successors and assigns for the purposes aforesaid." This is the covenant in suit. Norton and Darrow conveyed the whole tract thus conveyed to them to the Oak Bluffs Land and Wharf Company, with the limited

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covenants provided for by the words which we have quoted. The company conveyed a part of the tract to the plaintiff. It is alleged that two parcels thus conveyed had been dedicated to the public as public parks by the six grantors above named, before the delivery of their deed, and that the plaintiff has been evicted by the decree of this court in *Attorney General* v. *Abbott*. The case is here on demurrer.

The plaintiff meets with a difficulty at the outset. A covenant by several with two of their number would not be enforced at law. *Eastman* v. *Wright*, 6 Pick. 316, 320, 321. And although a covenant of warranty running to the grantee, his heirs and assigns, can be sued upon by the assignee in his own name, still it does not operate as a letter of credit, offering a new covenant to whoever will take the land on the faith of it. This has been settled in this Commonwealth in a much stronger case than the present. *Saunders* v. *Saunders*, 154 Mass. 337. See also *Columbia Falls Brick Co.* v. *Glidden*, 157 Mass. 175. There is but one covenant, and that one is not negotiable. The assignee stands as successor to the original covenantee, and takes the original covenant with all its manifest infirmities. *Norcross* v. *James*, 140 Mass. 188, 189. See Co. Lit. 389 b, 390 a; 1 Shep. Touchst. 201; Rawle on Covenants, (5th ed.) § 223; *Silverman* v. *Loomis*, 104 Ill. 137, 142; *Brown* v. *Metz*, 33 Ill. 339; *Goodel* v. *Bennett*, 22 Wis. 565. In this instance the beneficial interest in the covenant, had there been any, would have been in all the covenantors, because the covenantees took only as trustees for them.

Whether, if the covenant had been general, this difficulty could have been got over, and equity if not law would have given relief, or whether the difficulty is deeper than any question of procedure, we need not consider, because in our opinion the covenant does not undertake to defend the plaintiff, and is not intended for his benefit, directly or indirectly. The deed says very plainly that purchasers are to have a limited warranty by Norton and Darrow against all persons claiming under Norton and Darrow as trustees, and nothing more. It would be against its clearly expressed intention to say that purchasers got a general warranty from Norton and Darrow, and from others into the bargain. So when we come to the words of the warranty we find

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that, although not very artificial, they follow the intent already expressed. It is true that the covenants begin in the usual way, — that the grantors, etc., do covenant with the grantees and their heirs and assigns; but to warrant and defend whom? Not the grantees, their heirs and assigns, but the "grantees, the survivors of them, their successors and assigns for the purposes aforesaid." Purchasers are to get their covenants from Norton and Darrow, when the latter come to sell. This covenant is confined to the trustees and their successors in the trust. And this is the meaning, equally whether the words "for the purposes aforesaid" be taken to qualify "assigns," as we are disposed to take them, or "warrant and defend."

There are other difficulties which would have to be overcome before the plaintiff could recover, but the one which we have mentioned is enough.

Demurrer sustained, and bill dismissed.

E. Avery & W. G. Russell, for the defendant Hills.

T. E. Grover, for the other defendants, did not care to be heard.

G. C. Abbott, pro se.

GEORGE H. HOLMES, trustee, *vs.* MARY W. HANCOCK & others.

Middlesex. January 31, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Trust — Heirs — Remainder — Statute.

A testator by will gave property to a trustee to pay the income to a son for life, the principal at his decease to go to the son's heirs. Upon the son's death he left a widow, but no issue, and as only next of kin three children of a deceased sister. The fund in the trustee's possession, which was less than three thousand dollars, was made up of the proceeds of both real and personal estate of the testator. *Held*, that the whole fund went to the widow.

BILL IN EQUITY, filed July 15, 1892, by the plaintiff, as trustee under the will of Solomon Hancock. The bill alleged that the plaintiff had in his possession the sum of $2,608.80,

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which he held in trust under the above will, to pay over the income from time to time on demand to said William T. Hancock during his natural life, "or, if said trustee shall deem it most to the benefit of those concerned, he may sell and convey said trust property by a good indefeasible conveyance, and put the proceeds on interest, and from time to time pay over said interest to said William T. Hancock during his natural life, and at the decease of said William T. Hancock said trustee or his successor shall pay over or deliver to the heirs of said William T. Hancock the principal, or said trust property or fund."

William T. Hancock died on February 14, 1892, leaving a widow, Mary W. Hancock, but no issue; and as only next of kin Edwin F. Hancock, John Hancock, and Charles A. Hancock, children of Ann Susan Hancock, a deceased sister. The fund in the trustee's possession was $2,608.80, which was made up of the proceeds of both real and personal estate of the testator. Mary W. Hancock contended that she was the only heir at law of the deceased, and the children of Ann Susan Hancock contended that they were his sole heirs at law.

The case was heard by *Lathrop*, J., and, at the request of both parties, was reserved by him for the consideration of the full court.

J. E. Farnham, for the widow.

E. H. Jose, for the next of kin.

ALLEN, J. The fund in question is only $2,608.80, and if it is to go as real estate of William T. Hancock would go in case of intestacy, his widow would be entitled to the whole of it, since he left no issue living. Pub. Sts. c. 124, § 3. If, on the other hand, it is to go as personal estate would go, she would still be entitled to the whole of it. Pub. Sts. c. 135, § 3, cl. 5. Upon any construction of the phrase "heirs of said William T. Hancock," the whole fund would go to the widow. *Proctor* v. *Clark*, 154 Mass. 45, 49.

Decree accordingly.

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HENRY H. SEARS & another, administrators, *vs.* SALLY E. CHAPMAN & others.

Barnstable. January 31, 1893. — March 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Will — Trust for Charitable Purpose — Provision regarded as Administrative Detail — Omission to name Trustee immaterial.

The following clause in a will constitutes a good gift to charity: "After the said O. is no longer my widow either by death or otherwise, I give and bequeath all that may then remain of my property for the benefit of the inhabitants of E. and vicinity, for educational purposes. One third part of said property to be appropriated for a building and appurtenances, which shall be located on Quivet Neck in E., and the other two thirds to be a fund for the support of said institution, the interest of said fund to be so appropriated. The whole to be under the exclusive control of the inhabitants of Quivet Neck." The provision as to the "control of the inhabitants of Quivet Neck" is not of the essence of the gift, but is only an administrative detail; and it is not necessary that the testator should have named a trustee.

HOLMES, J. This is a bill for instructions whether the following clause in the will of Jacob Sears constitutes a good gift to charity: "After the said Olive F. Sears is no longer my widow either by death or otherwise, I give and bequeath all that may then remain of my property for the benefit of the inhabitants of East Dennis and vicinity, for educational purposes. One third part of said property to be appropriated for a building and appurtenances, which shall be located on Quivet Neck in East Dennis, and the other two thirds to be a fund for the support of said institution, the interest of said fund to be so appropriated. The whole to be under the exclusive control of the inhabitants of Quivet Neck."

There is no doubt that a trust for educational purposes is a good charitable trust. *Hadley* v. *Hopkins Academy*, 14 Pick. 240, 253. *Boxford Religious Society* v. *Harriman*, 125 Mass. 321, 327. *Davis* v. *Barnstable*, 154 Mass. 224. *Whicker* v. *Hume*, 7 H. L. Cas. 124. *Russell* v. *Allen*, 107 U. S. 163, 172. It is good where there is no limit of space expressed, and it is none the less so when the benefit of the gift is confined in terms, as it must be in fact, to a particular locality. *Lowell, appellant*, 22

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Pick. 215. *Clement* v. *Hyde*, 50 Vt. 716. It is equally good when the limit, although real, is not geometrically exact, as in this case "East Dennis and vicinity." *Attorney General* v. *Gladstone*, 13 Sim. 7, 11. *Hill* v. *Burns*, 2 Wils. & Shaw, 80, 90, 91. *Miller* v. *Rowan*, 5 Cl. & F. 99, 110. *Wallace* v. *Attorney General*, 33 Beav. 384. *Saltonstall* v. *Sanders*, 11 Allen, 446, 467. As the testator's plan is to carry out the purpose of his gift by means of a building, probably the convenience of those concerned will draw the line without the help of the court, unless the fund is insufficient for the testator's scheme.

It is argued, on behalf of the heirs and next of kin, that the provision "the whole to be under the exclusive control of the inhabitants of Quivet Neck," is the consideration and condition of the gift within the principle of *Bullard* v. *Shirley*, 153 Mass. 559. It is assumed that this must fail, and therefore, it is said, the gift fails. We do not think that we can make it plainer than it is upon the first reading of the clause, that such control is not of the essence of the gift, but is only an administrative detail. Moreover, on the facts before us, although probably a scheme will have to be framed, we cannot assume that it is any more impossible for the inhabitants of Quivet Neck to control the administration of the fund than it would be if they were a town. *Drury* v. *Natick*, 10 Allen, 169, 182. *Cary Library* v. *Bliss*, 151 Mass. 364. In *Baylis* v. *Attorney General*, 2 Atk. 239, where money was left "to the ward of Bread Street, according to Mr. —— his will," Lord Hardwick suggested a decree that the money, "from time to time, be disposed of in such charities as the alderman, for the time being, and the principal inhabitants, shall think the most beneficial to the ward."

It is settled by a line of decisions in this Commonwealth that a gift like the present, for a specified charitable purpose will not fail for want of a trustee. The doubts which have been expressed on this point (*Jackson* v. *Phillips*, 14 Allen, 539, 576, and *Minot* v. *Baker*, 147 Mass. 348, 353) must be confined to "gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it." *Jackson* v. *Phillips*, *ubi supra*. See *Missionary Society of the Methodist Episcopal Church* v. *Chapman*, 128 Mass.

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265, 268, and cases cited. The statement in Boyle, Charities, 213, is, that, "to give jurisdiction to the court when the selection of objects has been left undetermined by the testator, it seems essential that trustees should be interposed for performance of the office, or at least that an intention should have been evinced by the testator to commit the disposal of his property to some one." In the present case even the English criteria of jurisdiction are satisfied.

Decree accordingly.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

G. A. King, for the heirs at law and next of kin.

BRIDGET HORGAN *vs.* PACIFIC MILLS.

Essex. November 1, 1892. — March 4, 1893.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Parent and Child — Recovery by Mother for Loss of Service, Labor performed, and Expenses.

A widow with minor children, who keeps the family together and supports herself and them, with the aid of their services, has very much the same control over them and their earnings during their minority, and is subject to the extent of her ability to much the same civil responsibility for their education and maintenance, as a father.

When a minor child lives with its mother, who is a widow, and is supported by her, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child caused by the negligence of the defendant.

TORT for damages for the loss of service of the plaintiff's daughter, a minor, and for labor performed and expenses incurred in the care and cure of her daughter in consequence of injuries received by her through the negligence of the defendant. The writ was dated March 23, 1886.

An action against the same defendant had previously been brought by the daughter for damages for the injuries received by her, and that action had been settled by the parties on October 26, 1885.

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In the Superior Court the case was referred to an auditor, who found that the plaintiff was entitled to recover the sum of $227.25, and his report was accepted by the parties as an agreed statement of facts, the material portions of which appear in the opinion. It was further agreed that in the suit by the daughter no claim was made for expenses or loss of services.

The Superior Court, in March, 1892, found for the plaintiff for the sum of $309.97, being the amount found due by the auditor with the interest thereon from the date of the writ. The defendant appealed to this court.

J. P. Sweeney, for the plaintiff.

C. U. Bell, for the defendant.

FIELD, C. J. The plaintiff's daughter when injured was eleven years old, and it appears that she, with her sisters, one older and two younger than herself, lived with their mother, who was a widow, as members of one family, and that the children were dependent for support on the mother, and rendered some service to her "in work about the house and in tending a small shop which was the front room of the tenement in which they lived." In consequence of the injury the plaintiff suffered loss of her daughter's services, and was put to expense in providing medical attendance for her, and to labor and trouble in nursing and taking care of her. The auditor's report has been made an agreed statement of facts, and the exact finding of the auditor on the question of damages is as follows: "By reason of her daughter's injuries the plaintiff incurred an expense of $10 for help in work about the house while the plaintiff was taking care of her daughter, and rendered personal service in nursing and caring for her daughter which was fairly worth $50, and paid for medical attendance and treatment of her daughter on account of said injuries $36, and for expenses properly incurred in going to the Massachusetts General Hospital the sum of $11.25, and for prescriptions, medicines, etc. the sum of $20, and by reason of said injury the value of her daughter's services to her was diminished $100; and I find that all said expenses were properly incurred by the plaintiff, who was without means of support other than her own exertions, without any agreement between her and her daughter for repayment thereof, unless such agreement is to be implied by law from the facts herein reported.

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And that the daughter at the time said expenses were incurred had no property or thing of value, excepting a claim against this defendant for damages suffered by reason of their said negligence, and that this claim was not settled or paid until October 26, 1885, which was after all said expenses were incurred, so that at the time said expenses were incurred the daughter was actually dependent upon the plaintiff for support and care." These sums amount to $227.25, which the auditor found the plaintiff was entitled to recover, unless the value of the loss of services occurring after the date of the settlement of the daughter's suit should be deducted, which he estimated at $25.

It appears that the daughter brought suit against this defendant for the injury, and that the suit was settled by the payment of $2,800, which the plaintiff in the present action received, as guardian of her daughter, having been appointed guardian on September 21, 1885. It is agreed that in this suit by the daughter no claim was made for expenses or loss of services.

The tendency of modern decisions is to give to a widow left with minor children, who keeps the family together and supports herself and them, with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her to the extent of her ability much the same civil responsibility for their education and maintenance, as are given to and imposed on a father. We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant. *Dedham* v. *Natick*, 16 Mass. 135. *Hammond* v. *Corbett*, 50 N. H. 501. *Matthewson* v. *Perry*, 37 Conn. 435. See *Dumain* v. *Gwynne*, 10 Allen, 270; *Camerlin* v. *Palmer Co.* 10 Allen, 539; *Baldwin* v. *Foster*, 138 Mass. 449; *Gleason* v. *Boston*, 144 Mass. 25; *Connell* v. *Putnam*, 58 N. H. 534; *Whitaker* v. *Warren*, 60 N. H. 20; *County Commissioners* v. *Hamilton*, 60 Md. 340; *Natchez, Jackson, & Columbus Railroad* v. *Cook*, 63 Miss. 38. Of course there should not be a double recovery, but if the expenses are not incurred on the credit of the child, but on

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that of the mother, and if the child, while living with the mother, is not entitled to its own earnings, so that the loss of service is not the child's loss but the mother's, these items of damage should not be included in the damages recovered by the child, but in those recovered by the mother. See *M'Carthy* v. *Guild*, 12 Met. 291; *Dennis* v. *Clark*, 2 Cush. 347; *Wilton* v. *Middlesex Railroad*, 125 Mass. 130. In the case of a girl eleven years old, whose father is dead and whose mother remains a widow, and who has no property and no guardian, it is wise policy to give the control of her to her mother, and to impose on the mother the ordinary rights and duties of a parent, unless it has been determined otherwise by some tribunal having jurisdiction over the relation of parent and child.

The finding of the court seems to be for the sum found by the auditor, with interest from the date of the writ. This, we think, is correct. It does not appear from the papers that judgment has been entered on this finding, but we assume that this has been done, as the defendant appeals. The entry should be,

Judgment on the finding affirmed.

MARIA KULLBERG *vs.* HUGH R. O'DONNELL.

Suffolk. November 17, 1892. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Further Instructions — New Trial — Practice.

After the case had been committed to the jury, the judge presiding at the trial sent for them, and in open court, though in the absence of counsel on both sides, gave them further instructions, after which they returned a verdict for the defendant. *Held*, that the plaintiff had no ground of exception.

It is the duty of the parties or their counsel to be present in court while it is open, after the trial of an action has begun until it is concluded, and the presiding justice cannot be prevented from giving further instructions to the jury because one or both of the parties, or their counsel, choose to absent themselves from the court while in session and while the jury are deliberating upon the case.

TORT, for slander. At the trial in the Superior Court, before *Thompson*, J., after the jury had retired to deliberate on their

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verdict, the judge sent for them, and in open court, though in the absence of counsel on both sides, gave them further instructions, as follows:

"I intended to call your attention before you retired to the importance of your coming to a verdict in this case. As you learned from the remarks of counsel, this case has been tried before. It is important, both for the plaintiff and for the defendant, that the jury should come to a verdict. The trial of a case is attended with a great deal of expense to both parties, and to the county. This is the mode provided by law for the trial of cases. There is no reason to believe that there will ever be a jury who will be better able to deal with the questions involved in this case than you are, and you ought to come to a verdict if you can conscientiously do so; and in considering the questions involved, you are to approach them with a disposition to agree; you ought to give proper weight to all the evidence. While it is a verdict of each, as well as the verdict of the twelve, you ought, if you can conscientiously, to come to a verdict; you ought not to say, unless you are compelled to, that you cannot come to a verdict. I shall have to ask you to consider the case further, and hope you will be able to arrive at a verdict."

After a verdict for the defendant, the plaintiff filed a motion for a new trial, which motion was denied; and the plaintiff alleged exceptions.

J. W. Low, for the plaintiff.

T. Riley, for the defendant.

FIELD, C. J. The presiding justice sent for the jury after the case had been committed to them, and they were brought into the court-room while the court was in session, and in open court the justice further instructed them "in the absence of counsel on both sides," after which the jury returned a verdict for the defendant. The plaintiff's counsel contends, as matter of law, that he is entitled to a new trial, because the jury were thus instructed in his absence. In *Sargent* v. *Roberts*, 1 Pick. 337, 342, it was said: "No communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of the counsel in the

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cause." In *Commonwealth* v. *Roby*, 12 Pick. 496, 518, it was said that the verdict was set aside in *Sargent* v. *Roberts*, "on the ground that the practice then prevailing was improper, and that it was important that all instructions to the jury should be given in open court." In *Merrill* v. *Nary*, 10 Allen, 416, 417, it was said: "The only regular and safe mode of conducting trials is, for the court to instruct the jury on all material points before they retire to deliberate upon their verdict, and, if they have occasion for further information, they should return into court and state the questions on which they wish for further advice, and receive in open court such directions as may seem to the judge material and necessary." See *Read* v. *Cambridge*, 124 Mass. 567. It is plain that the point decided is, that all instructions to the jury must be in open court. It is the duty of the parties or their counsel to be present in court while it is open, after the trial of an action has been begun until it is concluded, and the presiding justice cannot be prevented from giving further instructions to the jury because one or both of the parties or their counsel choose to absent themselves from the court while in session, and while the jury are deliberating upon the case. It may be a convenient practice to send for the counsel if they are near the court-house, in order that they may hear the instructions given and take exceptions if they see fit, but this is not required as matter of law, and the circumstances may be such as to render it impracticable.

Exceptions overruled.

SAMUEL B. HOPKINS *vs.* WILLIS A. COLSON & others.

Suffolk. December 6, 7, 1892. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Legacy — Specific Language — Support of Legatee.

A testatrix by her will directed her executors to "pay to the Old Ladies' Home in Boston a sum sufficient to secure a home for life" to her sister. *Held*, that the language of the will was specific, and that there was nothing in it indicating that, if for any reason her sister would not accept such a home, or if it could not be procured, she should be entitled to be supported elsewhere out of the estate.

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APPEAL, by Mary D. McLea, Willis A. Colson, and Marion E. Talcott, as guardian of Bessie and George Colson, from a decree of the Probate Court for Suffolk County allowing two accounts of George C. Leach as trustee under the will of Elizabeth P. Colson. The second account was rendered by Samuel B. Hopkins, executor of the will of George C. Leach.

In the Probate Court the case was referred to an auditor, who disallowed certain payments to Prudence Pray, a sister of the testatrix, and for her benefit and funeral expenses, amounting in the first account to $409.93, and in the second account to $1,005.34.

The case was heard upon the auditor's report, upon an agreed statement of facts, and upon the will, by *Allen*, J., who reserved it for the consideration of the full court. The material facts appear in the opinion.

J. Willard, for the plaintiff.

S. L. Whipple, for the defendants.

FIELD, C. J. The third article of the will of Mrs. Colson is as follows: "Third. I will and direct that at my decease my executors pay to the Old Ladies' Home in Boston a sum sufficient to secure a home for life to my sister, Prudence Pray. I also bequeath to her the sum of five dollars annually, to spend as she sees fit. And I further direct my executors to see that she is suitably clothed."

It appears from the auditor's report that, after the death of Mrs. Colson, Mr. Leach, the executor of the will, who was afterwards appointed trustee, made application "for Miss Pray's admission to the Old Ladies' Home in Boston, and there seem to have been some negotiations in regard to it, but for some reason — exactly what does not appear — she was never received into the Home. Mr. Andrew Cushing, the president of that institution, testified, and the rules of that institution provide, that the amount to be paid for admission is $150. Mr. Cushing testified that this was the lowest amount. It was the amount when no other arrangement was made. They require a person having property, on coming into the Home, to give it all up to the Home, and to sign a bond to give up all their future acquired property to the Home. A person who is received into the Home has provided by that institution food, clothing,

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medical attendance, and all things necessary for a comfortable living, and is buried at the expense of the Home."

The fourteenth article of the will is as follows: "Fourteenth. I give and bequeath to my three children, Willis A. Colson, Angelina E. Leach, and Mary D. McLea, and my two grandchildren, Bessie and George Colson, children of my son, George H. Colson, deceased, in equal shares, all the rest and residue of my property, including the remainder of my furniture, real estate, notes, bonds, or other securities, in trust, the income of which, excepting as directed in the third item, shall be shared equally between them, to dispose of as they severally shall see fit, during the lifetime of each. The principal to be divided equally among their children at their decease; but in case either of my children shall die without issue, their share shall be divided equally among the surviving grandchildren. At the death of either or both of my above named grandchildren, Bessie or George Colson, their share or shares shall be divided equally among my heirs."

The amount of all the property left by Mrs. Colson was about $8,000 in real property and $2,700 in personal property, "consisting mainly of articles of property and household furniture, which are covered by specific bequests of the will."

It is conceded that Miss Pray was entitled to be suitably clothed at the expense of the estate while she lived, and to receive out of it five dollars a year for spending money. The dispute is whether, as she was not received into the Home, she was entitled to be supported elsewhere while she lived, at the expense of the estate, and to be buried at its expense when she died.

The auditor ruled that she was not so entitled, and found that items of credit to the amount of $409.93 in the first account of Mr. Leach, and to the amount of $1,005.34 in the second account, should be disallowed. Mrs. Colson died on March 9, 1884, and Miss Pray died on June 10, 1889.

In *Parker* v. *Parker*, 126 Mass. 433, 437, it is said: "Where a testator provides in his will that his wife, child, or other person shall be supported and maintained by his executor, or where the condition of a deed or mortgage recites that the grantee or mortgagor shall support the grantor or mortgagee, and the in-

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strument does not point out that the support shall be provided in a particular place, then the party so entitled may have the support where under reasonable limitations he may choose to reside. But if the instrument points out the place where the support shall be furnished, it is not the right of the party entitled to receive it to demand that it shall be furnished elsewhere. Each case must be decided on its own facts, looking at the language of the instrument and the surrounding circumstances." It is manifest that, if the contention of the accountant is correct, there would be little or nothing of the estate to be distributed under the fourteenth article of the will during the life of Miss Pray. If, however, the testatrix contemplated that a sum of money should be paid at once to the Old Ladies' Home, there probably would be left a considerable amount of property, the income of which, subject to an annuity of five dollars a year to her sister, and perhaps to the payment of a small sum required for her clothing, might be distributed among the three children and two grandchildren mentioned in the fourteenth article; and in the event of the decease of any of them, a part of the principal might be divided among their issue, or the surviving grandchildren, or the heirs of the testatrix. The language of the third article of the will is specific, that the executor pay to the Old Ladies' Home a sum sufficient to secure a home for her sister, and there is nothing in the article, or in the rest of the will, indicating that, if for any reason her sister would not accept such a home, or if it could not be procured, her sister should be entitled to be supported elsewhere out of the estate. It does not, indeed, appear in the case that it was impossible to obtain the admission of Miss Pray into the Home. It is consistent with the finding of the auditor, that the negotiations for her admission failed because Miss Pray or her relations were unwilling that she should enter the Home, or because she was unwilling to surrender to the Home all the property she then had or might thereafter acquire. But whatever may have been the cause why she was not admitted to the Home, we are satisfied that the third article of the will cannot be considered as making a general provision for the support of Miss Pray, with a statement by the testatrix of the manner in which she preferred that it should be furnished, but must be construed as giving a

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specific direction to the executor, which must be carried out in the manner prescribed or not at all. The decree of the Probate Court must be reversed, and there should be a decree according to the finding of the auditor. *So ordered.*

SAMUEL WOOD, administrator, *vs.* ANNA M. SEAVER, executrix.

Worcester. January 13, 1893. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Legacy — "And" not construed to mean "or" — "Heirs" as a Word of Limitation.

A testator, after giving by will pecuniary legacies to various persons added, at the close of the last bequest, "All the aforesaid legacies are to them and their heirs." *Held*, that the word "and" was used in its ordinary sense, and was not to be construed as "or," and that the word "heirs" was used as a word of limitation indicating that the whole interest of the testator in the personal property bequeathed was given absolutely to the legatees alive at his death, but not to the heirs of such as had died before him.

APPEAL by Anna M. Seaver, executrix of the will of Abraham W. Seaver, from a decree of the Probate Court adjudging that, by the death of the appellant's testator in the lifetime of Adaline K. Nelson, under whose will he was a legatee, his legacy lapsed.

The case was heard by *Holmes*, J., who reserved it for the consideration of the full court, on agreed facts, in substance as follows.

Adaline K. Nelson died on March 2, 1889, and by her will, which was duly admitted to probate, gave pecuniary legacies to Abraham W. Seaver and to several others, and added after the residuary bequest, "All the aforesaid legacies are payable at the convenience of my executor hereafter named, but within two years from the probate of this will. All the aforesaid legacies are to them and their heirs."

She appointed Abraham W. Seaver as her executor, but he

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died in the lifetime of the testatrix, and Samuel Wood was appointed administrator with the will annexed.

Anna M. Seaver, the appellant, is the daughter of Abraham W. Seaver, and is the residuary legatee and devisee under his will, of which she is executrix, and she is his next of kin and heir at law.

The appellant contended that the words "all the aforesaid legacies are to them and their heirs" meant that the legacies were given to the legatees named in the will if alive at the death of the testatrix, but if not alive at that time, then to their heirs respectively.

Subsequently Samuel Wood, as executor of the estate of Julia A. Nichols and as guardian of the estate of Addie A. Davis, a minor, and Eudolphus T. Rand, as executor of the estate of Eliza A. Rand, the residuary legatees and devisees under the will of Adaline K. Nelson, appeared as parties to this suit, and filed a supplemental statement of agreed facts, substantially similar to the foregoing, and at their request the case was reserved by *Lathrop*, J., for the consideration of the full court.

C. F. Aldrich, for the appellee.

J. D. Ball & B. L. M. Tower, for the appellant.

FIELD, C. J. The contention of the appellant is that the words, "All the aforesaid legacies are to them and their heirs," found at the close of item 17 of the will, mean that the legacies are given to the legatees named in the will if alive at the death of the testatrix; but if not alive at that time, then to their heirs, respectively. "And" in a will is sometimes read "or," when the context shows that such is the intention of the testator, but there is nothing in the context here which shows that the word has not its customary meaning. In a legacy of personal property to a legatee named and his heirs, the word "heirs," although technically appropriate to real estate, is taken to be a word of limitation, and to indicate that the whole interest of the testator in the personal property is given absolutely to the legatee. In the present case, one of the legatees not a child or other relation of the testatrix having died before the testatrix, the legacy lapsed. Pub. Sts. c. 127, § 23. *Kimball* v. *Story*, 108 Mass. 382.

Decree affirmed.

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PHILIP LEFAVOUR *vs.* MARGARET McNULTY.

Essex. January 13, 1893. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trespass — Private Way — Description in Deed.

Three parcels of land, A, B, and C, belonging to different persons, were situated on a private way leading northerly to a highway. Lot A lay on the easterly side of the private way, between lot B and the highway; lot B was situated at the southerly end of the private way; and lot C was situated on the westerly side of the private way opposite to lot A. Subsequently the three lots were conveyed to one person, who continued to use the way in connection with lot B until his death. Afterward his heirs conveyed lot A to the plaintiff, the westerly boundary running "on a courtway"; lot B was conveyed to the defendant, the boundary line on one side running "to a way leading to Essex Street," and then running "by said way"; lot C was conveyed to a third person, the boundary line on the easterly side running "southerly on a courtway, . . . with all the rights in common on said court." *Held*, in an action of trespass brought by the owner of lot A against the owner of lot B, that, construing all the deeds together, it was the intention of the grantors that the way should continue to be used by all the grantees in common, and that the boundary line of the lot conveyed to the defendant operated to give him a right to use the way as appurtenant to his land.

TRESPASS *quare clausum*, for entering upon the plaintiff's premises, situated in Salem, on May 1, 1886, and tearing down and destroying a fence thereon. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows.

In 1669, the plaintiff's land, marked A, extending southerly from Main Street, now Essex Street, in Salem, as shown on the following plan, was owned by Henry Kemble; the defendant's land, a part of which is shown on the plan and marked B, was owned by Alexander Sears; the lot designated on the plan as the Advent Church lot, and certain lots southerly thereof not on the plan and known as the Lynde Schoolhouse and the Ward Estate lots, were owned by Francis Skerry; and the lots marked C and D belonged to Humphry Coombs; all of whom derived title, through mesne conveyances, from Richard Raymond, who originally owned the entire tract. In that year Sears, the owner of the land now belonging to the defendant, having died, his administratrix, by deed dated July

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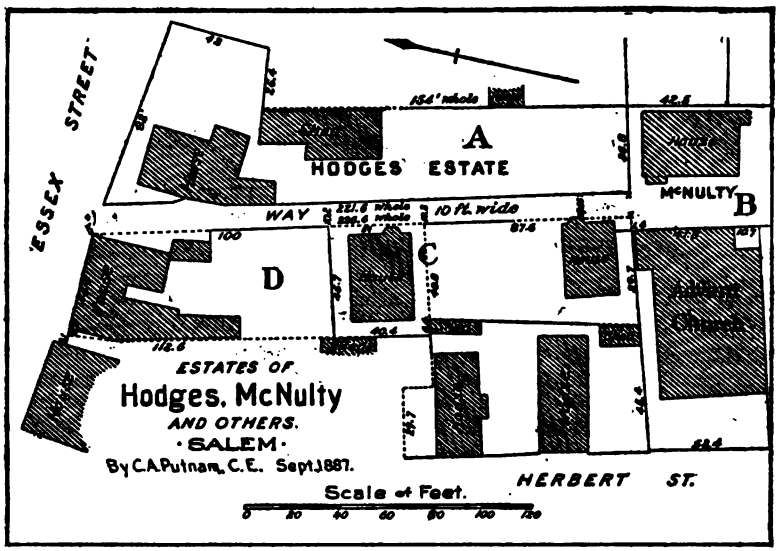

30, 1669, conveyed to Skerry an interest in a way as follows: "An interest and propriety in a highway which I have reserved for my own use which is part of that land belonging to my now dwelling house to say ten foote broad and to run between the house and the land of Humphry Coombs on the west and some lately sold to Henry Kemble now in the possession of George Thomas on the east from the highwaye or common on ye north to run south toward the water side to ye orchard of ye said Francis and to run sixty-nine half foot further along by ye side of ye orchard on the east side." This way extended southerly from Essex Street to a point somewhere opposite the building known as the Lynde Schoolhouse, which was directly south of the Advent Church, and since 1869 its location has remained unchanged, it has been open and in use in connection with the defendant's land and with the Advent Church, Lynde School, and Ward lots. For more than forty years a fence has been maintained across the way at the northerly boundary of what is now the defendant's lot, with a gate in it through which the way is used for the purpose of passing back and forth between the defendant's land and Essex Street.

From 1866 to 1883 the plaintiff's and defendant's land and lot C were owned by Elizabeth Hodges, and while she owned

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the three lots she continued to use the way in connection with the defendant's land. On her death in 1883 her real estate was sold by public auction, and her heirs, one acting by a guardian, on October 8, 1883, conveyed each of the three lots to three different persons. Lot A was conveyed to the plaintiff, the westerly boundary in the deed being "then turning and running northerly on a courtway two hundred and twenty-one feet to Essex Street," and the description ends as follows: "with all the rights in common on said court, it being the estate conveyed to Joseph Hodges by deed," etc. The easterly boundary of lot C in the deed made by the heirs to one Odell, who conveyed it to Jones, the present owner, is, "thence turning and running southerly on a courtway one hundred and twenty-seven feet and nine inches, with all the rights in common on said court." The westerly and northerly boundaries of lot B made by the heirs to the defendant were, "beginning at the southwesterly corner thereof, thence running northerly by land of Ward, and land now or formerly of Forrester, about three hundred and thirty-seven feet, to a way leading to Essex Street; then running easterly fifty-two feet by said way and land of Hodges"; and the description ends with "being the same premises conveyed to Elizabeth Hodges by James A. Farless et al. by deed." In the habendum of each of the deeds were the words "to have and to hold with all the privileges and appurtenances."

The defendant entered into possession under his deed, and continued to use the way for the purpose of passing from his land to Essex Street, until the plaintiff, who contended that the way had been discontinued, placed a lock on the gate, and prevented the defendant from further using the way. The defendant then, claiming a right in the way, removed the fence, which is the trespass alleged.

The judge ordered judgment for the defendant; and the plaintiff appealed to this court.

H. P. Moulton, for the plaintiff.

J. M. Raymond, for the defendant.

FIELD, C. J. We understand, from the agreed statement of facts, that the way was well defined by boundaries; that it had been used in connection with all the lands hereinafter described since 1669; and that for more than forty years a fence had been maintained across the way at the northerly boundary of what is

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now the defendant's lot, with a gate in this fence through which the way was used for the purpose of passing to and from Essex Street from and to the defendant's lot. From 1866 to 1883 the plaintiff's land, the defendant's land, and lot C were owned by Elizabeth Hodges. She might have discontinued the way except so far as the owners of lot D, which is north of lot C, had rights in it, but it is agreed that, while she owned the three lots, she used the way in connection with the land which now belongs to the defendant. On the death of Elizabeth Hodges her real estate was sold at public auction, and her heirs, one acting by a guardian, conveyed each of the three lots she owned to different persons. The sales and conveyances we understand were made at the same time. Lot A was conveyed to the plaintiff, the westerly boundary in the deed being "then turning and running northerly on a courtway two hundred and twenty-one feet to Essex Street," and the description ends as follows: "with all the rights in common on said court, it being the estate conveyed to Joseph Hodges by deed," etc. The easterly boundary of lot C in the deed made by said heirs to one Odell, who conveyed it to Jones, the present owner, was, "thence turning and running southerly on a courtway one hundred and twenty-seven feet and nine inches, with all the rights in common on said court." The westerly and northerly boundaries of lot B in the deed made by said heirs to the defendant were, "beginning at the southwesterly corner thereof, thence running northerly by land of Ward, and land now or formerly of Forrester, about three hundred and thirty-seven feet, to a way leading to Essex Street; then running easterly fifty-two feet by said way and land of Hodges"; and the description ends with "being the same premises conveyed to Elizabeth Hodges by James A. Farless et al. by deed," etc. This deed did not contain the words "with rights in common on said court," or any similar words. The boundaries and measurements of lots A and C, when applied to the plan, may perhaps be thought to indicate that the fee of the courtway was not intended to be included in the conveyances; but we assume, in favor of the plaintiff, that his deed conveyed the fee to the centre line of the way, with the right to use the whole of the way in common with others. In the habendum of each of the deeds were the words "to have and to hold with all the privileges and appurtenances," etc.

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Construing all the deeds together, it seems plain that it was the intention of the grantors that the way should continue to be used by all their grantees in common. The boundary line of the land conveyed to the defendant, running on one side "to a way leading to Essex Street," and then running "by said way," operated to give to him a right to use the way to Essex Street as appurtenant to the land, if the grantors could convey that right, and they plainly could in the present case. *O'Linda* v. *Lothrop*, 21 Pick. 292. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292. *Goss* v. *Calhane*, 113 Mass. 423. See *Geible* v. *Smith*, 146 Penn. St. 276. *Judgment affirmed.*

JOHN O'BRIEN *vs.* JAMES I. MURPHY.

Middlesex. January 13, 1893. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Omission to state Ground of Exception.

A bill of exceptions which states that a certain conversation was admitted in evidence, but does not show what it was, affords no ground of exception.

TORT for the conversion of a horse. At the trial in the Superior Court, before *Bond*, J., there was evidence tending to show that the defendant, as constable, attached a horse on a writ against Patrick O'Connor as his property. The plaintiff introduced in evidence a bill of sale of the horse to him from O'Connor, who was his brother in law. On direct examination the plaintiff was asked, "At any time did your brother in law get any money from you, and under what circumstances?" The defendant objected to the admission of this evidence, but the presiding judge overruled the objection, and admitted the evidence.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. H. Ponce, for the defendant.

F. P. Curran, for the plaintiff.

FIELD, C. J. The exceptions do not show what the contents of the bill of sale were, or what the conversation testified to was,

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and we cannot say that the evidence was incompetent, or, if it was, that the defendant has been prejudiced by the admission of it. *Exceptions overruled.*

WILLARD A. BULLARD, executor, *vs.* EMILY P. S. MOOR & others.

Middlesex. January 23, 1893. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Liability of Heirs after Settlement of Estate — Covenant — Statute — Bar — Ratification — Measure of Damages.

A testator gave a fund in trust for his wife, directing the trustee to pay over to her what she desired, and, upon her death, to dispose of it according to her will; but if she made no will, then to pay one half of the fund to his "heirs at law then surviving, they taking by right of representation," and the other half to his wife's heirs, ascertained in the same manner. The wife agreed with his heirs, then consisting of a brother, a sister, and the children of deceased brothers, not to divert the fund from them by will. Subsequently the sister died, leaving a son and a daughter, and the brother then covenanted with the wife for seven thousand dollars to protect her from her agreement and to obtain for her a release from such heirs. After some of the children of the deceased brothers had given him formal releases, and others had accepted parts of the money, the brother died unmarried, childless and intestate; and the sister's daughter, as his administratrix, ratified his covenants and releases, and paid other portions of the same money to the rest of the brothers' children, but she gave no release and accepted none of the money herself. The wife afterwards died, disposing of the entire fund by will away from her husband's heirs, and on suit brought by the heirs of the testator, her agreement was enforced as to the sister's children, who alone were not estopped. Suit was then brought by the executor of the wife against the heirs of the brother, after his estate had been settled by his administrators, to charge them on his agreement with the wife. *Held*, that the omission of the plaintiff to present his claim to the Probate Court, and to obtain an order that the administrators of the brother's estate should retain sufficient assets to satisfy it, under the Pub. Sts. c. 186, § 18, was not a bar to a suit against the heirs under the Pub. Sts. c. 186, §§ 26, 27. *Held, also*, that the ratification by the administrators of the brother's agreement with the wife bound his heirs also, and that the measure of damages for the breach of the agreement was not limited to the seven thousand dollars paid by the wife, but included the whole loss to her estate, if not in excess of the sum received from the brother's estate by his heirs.

BILL IN EQUITY, brought under the Pub. Sts. c. 186, § 26 *et seq.*, by the executor of the will of Caroline A. Wood, against the heirs at law and next of kin of Charles Wood, to charge them on a contract made by Charles Wood, whereby he agreed to pro-

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tect the plaintiff's testatrix from a certain contract entered into by her. Hearing before *Allen*, J., who reported the case, with the findings of the single justice in the case of *Wood* v. *Bullard*, 151 Mass. 324, for the determination of the full court, in substance as follows.

In August, 1877, Caleb Wood died childless, leaving a widow, Caroline A. Wood, and a will, wherein he devised the residue of his estate, amounting to more than $300,000, to a trustee to invest the same and pay over to his widow such sums or parts thereof as she might from time to time desire, and upon her decease to dispose of the trust fund then remaining as she might by her will direct; and in case she should fail to make a will, then to pay at her decease one half of said trust fund to his heirs at law then surviving, they taking by right of representation, and the other half to the wife's heirs, ascertained in the same manner.

His heirs at law at the time of his death were Charles Wood, a brother, Abigail W. Smith, a sister, and the defendants Amasa E. Wood, Amanda L. Minor, Charles N. Wood, Levi A. Wood, Lurena A. Hudson, Marcella M. Wood, and Lyman M. Wood, nephews and nieces, the children of two deceased brothers.

As some of the heirs at law had declared their intention of contesting the probate of the will, his widow, on September 24, 1877, entered into an agreement under seal with the heirs, wherein she covenanted that within two months from the probate of the will she would pay over to the said Abigail W. Smith the sum of five thousand dollars; and "that I will not make any testamentary disposition of the trust fund created under said will, and remaining at my decease, that shall prevent one half of the said trust fund remaining at my decease from descending to the said heirs, or their legal representatives, exactly as it would descend to said heirs by the terms of said will should I make no will, and that I will do no act which will prevent one half of said trust fund as shall remain in the hands of the trustee at my decease from going to the said heirs."

The will was accordingly proved and allowed, and the five thousand dollars duly paid to Mrs. Smith.

On April 10, 1879, Charles Wood, the testator's brother, entered into an agreement under seal with the testator's widow, which is the subject of the present suit, reciting the above mentioned agreement, and that she was dissatisfied therewith, and

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alleged it to be illegal, wherefore, in consideration of seven thousand dollars paid to him by her, "he does hereby cancel, annul, and forever discharge and release said contract, and he covenants and agrees with her, and her heirs and executors, to protect her from said contract, and that no claim against her or her estate shall be made under the same by any person, and that no objection shall be made on account of said contract to any will she has made or may make. And he further covenants that he will procure from the heirs of Caleb Wood, named in said contract, a release to said Caroline of said contract and all rights under the same."

The former agreement was thereupon surrendered by Charles Wood to Caroline A. Wood, and was found among her papers after her death, cancelled, the signature being cut out, and the words "cancelled and surrendered" written across the instrument; but Charles Wood did not obtain a release from all the parties with whom Caroline contracted. On January 21, 1882, Abigail W. Smith, who resided in Vermont, died, leaving as her heirs the defendants Emily P. S. Moor and Charles W. Smith, her children. On December 11, 1884, Charles Wood died childless and unmarried, leaving a will, which, on January 21, 1885, was refused admission to probate, and leaving as his heirs at law the above named nephews and nieces of Caleb Wood, and the above named two children of Abigail W. Smith, all of whom are the individual defendants in this case. On December 6, 1886, Caroline A. Wood died, leaving a will, wherein she disposed of all the property in the hands of the trustee, which then amounted to about two hundred and sixty thousand dollars, away from the heirs of her husband. The will was duly admitted to probate, and the plaintiff, Willard A. Bullard, who was then trustee under the will of Caleb Wood, being named therein as executor, qualified as such.

On May 10, 1887, Charles N. Wood, Emily P. S. Moor, Allen L. Wood, Edson A. Wood, Lyman M. Wood, Marcella M. Wood, Lurena A. Hudson, and Amanda L. Minor, who were all heirs at law of Caleb Wood and also of Charles Wood, and are the defendants in the present suit, gave notice to Bullard that they would not contest the will of Mrs. Wood, but that they should assert their claims under her contract dated September 24, 1877, and on May 31, 1887, brought suit against Willard A. Bullard,

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the present plaintiff, as trustee under the will of Caleb Wood and executor of the will of Caroline A. Wood, and against Charles W. Smith. Subsequently Charles W. Smith was struck out as a defendant, and became a party plaintiff.

The defences to this suit were the release and agreement given by Charles Wood, dated April 10, 1879, formal releases given by three of the nephews, the acceptance by others of the nephews and nieces of the money paid by Mrs. Wood for the release and agreement by Charles Wood under circumstances constituting an estoppel or an accord and satisfaction, and the death of Mrs. Smith before that of Mrs. Wood, which, it was contended, had the effect to cut off any claim on the part of her two children. The plaintiffs' replication alleged that the release by Charles Wood was given when he was of unsound mind; and this question was submitted to a jury, who disagreed. All other questions of fact were tried before a single justice, who found that the administrators of Charles Wood had ratified the release and transaction with Mrs. Wood, subject to the question of law whether administrators can ratify a reasonable agreement made by an insane intestate, and found against the plaintiffs, and reported the case for the determination of the full court.

On April 1, 1890, the decision of the full court was given, dismissing the bill as to all the plaintiffs, except Mrs. Moor and Charles W. Smith, and directing a decree in favor of those two. See 151 Mass. 324.

On November 21, 1890, Emily P. S. Moor having been appointed administratrix of the estate of Abigail W. Smith in Massachusetts, was, as such administratrix, admitted as a party plaintiff in that suit, and on December 4, 1890, a final decree was entered, supplemented on May 16, 1891, by a decree fixing the amount to be paid in satisfaction of the former decree at $59,874.87, which, with expenses incident to the defence of that suit, amounting to $4,005.74, was on May 20, 1891, paid by Bullard, as executor, to Emily P. S. Moor, as administratrix of the estate of Abigail W. Smith.

On May 5, 1885, John D. Lovell and Mrs. Moor were appointed administrators of the estate of Charles Wood, and the estate was settled and divided by them according to a written agreement among the heirs. On April 1, 1890, the date of the decision of the full court in *Wood* v. *Bullard*, there remained in the hands

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of the administrators the sum of $6,303.42; and the real estate which descended to the heirs, and the income derived therefrom, remaining undivided on that date, amounted in value to $4,932.90.

On May 20, 1890, before the final decree in *Wood* v. *Bullard* had been entered, the estate of Charles Wood had been fully administered; but by virtue of agreements under seal with the heirs, the administrators held sufficient assets to meet the plaintiff's claim. The whole amount paid to the heirs from the estate of Charles Wood was $152,543.62.

The present suit was brought on May 21, 1891, the money paid to Mrs. Moor, under the decree in *Wood* v. *Bullard*, then remaining in her hands; but no application was ever made to the Probate Court by the plaintiff in this suit for an order that the administrators of the estate of Charles Wood should retain funds to meet a claim under this agreement, nor was such an order ever passed.

The defendants contended that Charles Wood was of unsound mind at the time of executing his agreement with Caroline A. Wood, dated April 10, 1879, which question of fact, at the request of the parties, was reserved for further determination, if in the opinion of the full court it becomes material; and, further, that, independently of that question, the plaintiff is not entitled to maintain this bill.

S. Hoar, (*W. Sullivan* with him,) for the plaintiff.

R. M. Morse, (*G. W. Parke* with him,) for the defendants Mrs. Moor and Charles W. Smith.

M. Morton, for Charles N. Wood.

HOLMES, J. This is a bill in equity, brought under Pub. Sts. c. 136, § 26 *et seq.*, by the executor of the will of Caroline A. Wood against the heirs and next of kin of Charles Wood, to charge them on a contract made by Charles Wood in respect of the sum paid out in the suit of *Wood* v. *Bullard*, 151 Mass. 324, 335. There is no question that the sum which the present plaintiff was compelled to pay in that suit was a claim against which Charles Wood covenanted to protect Caroline. The main questions are whether this proceeding is open to the plaintiff, and, if it is, whether the defendants are entitled to go to trial on the sanity of Charles Wood at the time he made the agreement. There is also a question of the measure of damages.

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Charles Wood covenanted four things: to protect Caroline Wood from a contract of hers under which her estate was compelled to pay in *Wood* v. *Bullard;* that no claim should be made under that contract against her or her estate; that no objection should be made on account of it to her will; and to procure a release to Caroline from her contractees. Charles Wood did not procure a release from all the parties with whom Caroline contracted, but she had the instrument in her possession seemingly cancelled, and heard nothing of any claim on it during her life, nor was any claim made until May 10, 1887, after the two years statute had run against the estate of Charles. The suit of *Wood* v. *Bullard* was brought on May 31, 1887. The decision of the single justice was against all the plaintiffs, that of the full court was against all the plaintiffs but two. The decision in favor of the claim of those two was not announced until April 1, 1890, when the administrators of Charles Wood had only $6,303.42 in their hands, and that decision was not in favor of the two in the capacity in which they sued; so that there was no valid claim made until an amendment was allowed on November 21, 1890, at which date the administrators had fully administered. The claim was paid on May 20, and this suit was brought on May 21, 1891.

It is not argued seriously that the present claim against the heirs was barred by the running of the two years' statute. The covenant to protect Caroline Wood was a distinct obligation, (*Badger* v. *Titcomb*, 15 Pick. 409, 413,) which was not broken until long after the two years had elapsed. *Valentine* v. *Wheeler*, 122 Mass. 566, 568. *Aberdeen* v. *Blackmar*, 6 Hill, (N. Y.) 324. But it is said that, under Pub. Sts. c. 136, § 13, the plaintiff might have presented his claim to the Probate Court, and might have obtained an order that Charles Wood's administrators should retain assets to satisfy it, and that a neglect to take that proceeding is a bar to a suit against the heirs under § 26 *et seq.* *Pratt* v. *Lamson*, 128 Mass. 528. In *Ames* v. *Ames*, 128 Mass. 277, it was held that the Gen. Sts. c. 97, § 8, did not apply to a contract like this while it still was uncertain whether anything ever would be due under it, and if that case applies to the corresponding section of the Public Statutes it governs this. But it is said that the amendment incorporated from St. 1879,

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c. 71, corrects that decision. As it reads now, "a creditor of the deceased" may present his claim, and if it appears "that such claim is or may become justly due," the court is to order assets to be retained. The words "or may become" have been inserted.

But the statute must be construed reasonably. It cannot have been intended to enable any one, who has an outstanding contract made by a deceased person, to suspend the settlement of the estate indefinitely, without regard to the probability of anything becoming due upon the contract, and when it still is impossible for the Probate Court to form any estimate of what amount should be retained as "sufficient to satisfy the same" in the words of the statute. The meaning of the word "creditor," retained from the General Statutes, has not been changed so far as that. Furthermore, although we do not rely on this circumstance as sufficient in itself, if the plaintiff might have applied to the Probate Court, still, at the earliest date when he had the slightest reason for doing so, his claim could not have been provided for in full, and the amount to be reserved, if any, was a pure matter of speculation, and remained so until the estate was fully administered. See *Wood* v. *Bullard*, 151 Mass. 324, 332. We are of opinion that the plaintiff was not barred of his present proceeding by his failure to apply under § 13. See *Clark* v. *Holbrook*, 146 Mass. 366, 368.

The next question is whether the defendants have a right to try the sanity of Charles Wood. It is found as a fact that his administrators ratified his agreement, if administrators can ratify a reasonable agreement of an insane intestate. This means, of course, that they effectually ratified, subject to the question of law mentioned. The grounds of the finding are not stated, and we cannot inquire whether they had sufficient knowledge, as we are asked to do. There is no doubt, and it is not disputed, that administrators can ratify such a contract. For that purpose they represent the person of their intestate restored to sanity. *Wood* v. *Bullard*, 151 Mass. 324, 329.

But it is said that, although the ratification estops the administrators, it is of no effect against the heirs. Ratification is not estoppel, but it is election, a different conception. *Metcalf* v. *Williams*, 144 Mass. 452, 454. When it operates, it operates not against the person ratifying, but on the contract, making it

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as if perfect from the beginning. See *Dempsey* v. *Chambers*, 154 Mass. 330, 332. It would be anomalous if the contract could be rehabilitated as to one class of persons, and yet remain invalid as to another. Still, if the question arose at common law on a covenant which bound both heirs and administrators, it might be difficult. See *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 236, 248; *Langley* v. *Langley*, 45 Ark. 392, 397. Heirs represent the person of the deceased, as well as executors or administrators. *Day* v. *Worcester, Nashua, & Rochester Railroad*, 151 Mass. 302, 307, 308. Originally they alone represented him in the secular courts, and the executor had a different function. Bract., fol. 407 b, 61 a, b. In *Clark* v. *Holbrook*, 146 Mass. 366, 368, it was said that the heirs' liability still was a liability on the contract. But however that may be, even apart from our statutes, executors and administrators have come to represent the person of the deceased "more actually" than do the heirs. Co. Lit. 209 a. Wms. Exrs. (8th ed.) 1731. Although at common law an heir could not plead that there was an executor who had assets, still, as between him and the executor, the personal estate in the hands of the latter was, as it still is, the primary fund for the payment of debts. Wms. Exrs. (8th ed.) 1669. *Robinson* v. *Simmons*, 156 Mass. 123, 125, 126. Now the executor or administrator in ordinary cases is the only person liable, and the liability of the heirs is governed wholly by statute, standing alongside of that of devisees, legatees, and next of kin, as a mere liability to restore an amount not exceeding what they have received from the deceased. Pub. Sts. c. 136, §§ 26, 27. See *Clark* v. *Holbrook*, *ubi supra*. It does not exist except when the executors and administrators cannot be sued, and the same claim, if it had happened to accrue earlier, so that it could have been sued upon against the administrators, would have intercepted the property before it came to the defendants' hands. For these reasons we are of opinion that the ratification of the contract by the administrator bound the defendants.

The last point argued for the defendants is, that at all events the measure of damages is the $7,000 paid by Caroline Wood to Charles Wood for his covenant. Her earlier contract was that she would not "make any testamentary disposition of the trust fund" left by her husband, "and remaining at my decease,"

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from going as the trust fund would go under her husband's will, so far as she had not required the trustee to pay it over to her. It is said, and it is true, that she could have made her agreement ineffectual by calling on the trustee for funds, and using them in her lifetime. But the conclusion does not follow that her failure to do so must cut down the damages. It was to save her from the necessity of doing so, presumably, that the new agreement was made. During her life she had no actual knowledge of any claim on it, or ground to suspect that there was any other than a formal one for not procuring releases from all the heirs. She had her own contract in her pocket, with the signature torn off, and undoubtedly never dreamed that it still might be held to be an existing obligation. Charles Wood's covenant was a covenant of indemnity, inviting her to the very repose which she practised, and we see no reason why his heirs and next of kin should not make good the whole loss to her estate, subject to the limit indicated in § 27. *Smith* v. *Way*, 6 Allen, 212. *Valentine* v. *Wheeler*, 122 Mass. 566, 570. *Mott* v. *Hicks*, 1 Cowen, 513, 539, 540. *Howard* v. *Lovegrove*, L. R. 6 Ex. 43.

Decree for plaintiff.

ELEANOR VINTON & others *vs.* REUBEN GREENE & others.

Suffolk. January 26, 1893. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Passageway — Abandonment — Change of Grade — Description in Deed.

A parcel of land was conveyed to the plaintiff by a deed describing the southeasterly boundary as "a line running longitudinally through the centre of the brick wall between the premises hereby conveyed and the adjoining estate," and in the same deed was granted "the right of use in common with the abutters thereon of a passageway on the southeast boundary as now laid out, about five feet wide, for any and all lawful purposes." At that time there was a continuous brick wall on the southeast boundary of the plaintiffs' land, and the only access to the passageway was by a gate through the wall. The owner of the adjoining estate subsequently lowered the grade of the passageway, and the plaintiffs then closed their gate by building a solid wall, and opened a coal-hole through the wall on the passageway on a level with the new grade. *Held*, on a bill in equity to restrain the defendants from changing the grade of the passageway, that even if the

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opening of the coal-hole was unauthorized, and the use of it on the land covered by the party wall was a trespass, the use of the way by the plaintiffs was rightful ever since the closing of the gate, and that the closing of the gate did not constitute an abandonment. *Held, also*, that if the use of the coal-hole was not only unlawful in itself, but made the use of the passageway in connection with it unlawful, nevertheless such a continuous use of the passage with the knowledge and against the will of the owner of the fee was notice to him, and all concerned, that the plaintiffs' claim on the way was not abandoned. *Held, also*, that if the plaintiffs were bound to take any notice of the acts of strangers to the servient tenement, whose land abuts on one end of the passageway, and who have built on a plan which requires the lowering of the way, such notice was manifested by the maintenance of the coal-hole, and the plaintiffs were entitled to a decree restraining them from so changing the grade.

BILL IN EQUITY, filed on November 9, 1891, praying that the defendants be restrained from changing the grade of a passageway leading into Temple Place, in the city of Boston. Hearing before *Allen*, J., who directed a decree for the plaintiffs, from which the defendants appealed; and the case was reported upon the pleadings, an agreed statement of facts, and the evidence, for the determination of the full court upon the appeal. The bill alleged the following facts.

The plaintiffs are the owners of a parcel of land in the city of Boston, bounded southwesterly by Temple Place, so called, northwesterly by land of Thomas H. Perkins, northeasterly by land of the Proprietors of St. Paul's Church, and southeasterly by land of Reuben Greene. There is appurtenant to their estate a right to use, in common with the other abutters thereon, a passageway about five feet wide over the land of Greene, on the southeasterly boundary of the plaintiffs' land, which right was granted by deed dated April 12, 1833, from Thomas H. Perkins to John S. Stone, through whom by mesne conveyances the plaintiffs claim title. The defendants Shepard, Norwell, Ferguson, and Cole had leased a portion of the premises belonging to the Proprietors of St. Paul's Church, and were erecting thereon a structure which abuts on the plaintiffs' land and upon the northeasterly end of the passageway; and they were about to remove a portion of the soil, and to lower the grade at the easterly end of the passageway.

The defendants filed separate answers. Shepard, Norwell, and Company admitted that they had leased the land of the Proprietors of St. Paul's Church, and had erected a building thereon, but denied any intention of removing the soil, or of

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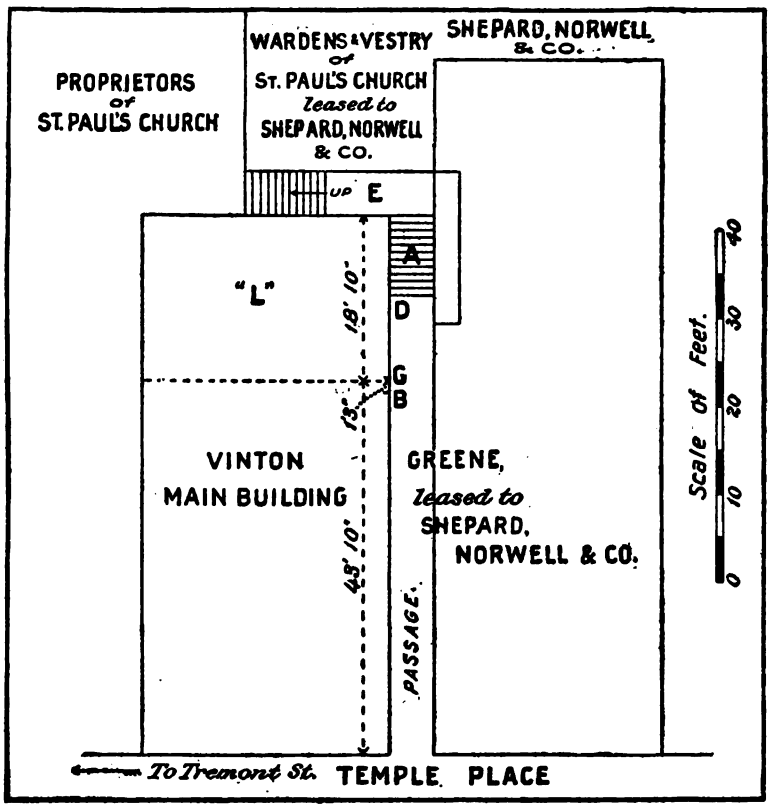
lowering the grade of the passageway; but by a supplementary answer they alleged that since their former answer they had acquired a leasehold interest in the estate next adjoining that of the plaintiffs, including the passageway, and that Greene had granted to the proprietors of the church permission to depress the steps at the end of the passageway for a term of years, and this permission had accrued to their benefit as lessees. The answers of Greene and of the Proprietors of St. Paul's Church denied that there was appurtenant to the plaintiffs' estate a right to use the passageway, and that, if any such ever existed, it had been abandoned. The Wardens and Vestry of St. Paul's Church, as owners of the land at the northerly end of the passageway, were admitted as parties defendant, and adopted the answer of the Proprietors of St. Paul's Church.

The following is a plan of the premises.



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The agreed facts stated in substance that the premises were substantially as shown on the foregoing plan; that the passageway in question ran from Temple Place to land of the Wardens and Vestry of St. Paul's Church at the point marked A; that the plaintiffs owned and occupied the premises marked "Vinton," and held title by mesne conveyances under a deed given on April 12, 1833, to John S. Stone, rector of St. Paul's Church, by Thomas H. Perkins, who owned the passageway and the land on each side of it; that the deed described the southeasterly boundary of the granted premises as "a line running longitudinally through the centre of the brick wall between the premises hereby conveyed and the adjoining estate, about seventy feet," and conveyed to the grantee, his heirs and assigns, a right of way in the passageway upon the premises now owned by the defendant Greene as follows: "the right of use in common with the abutters thereon of a passageway on the southeast boundary as now laid out, about five feet wide, for any and all lawful purposes, with the express understanding that said passageway shall be maintained and supported at the common expense of all the abutters thereon"; that the defendant Greene acquired the premises marked "Greene," including the passageway, in 1866, and held title by mesne conveyances under a deed dated June 1, 1832, given by John Amory to John A. Lowell, in which it was stipulated that the grantee, his heirs and assigns, should leave the passageway "free for the passage of the Proprietors of St. Paul's Church, and their assigns, to and from the land appurtenant to said church"; and that the Wardens and Vestry of St. Paul's Church owned the premises at the northerly end of the passageway, and the Proprietors of St. Paul's Church the premises next adjoining on the west, and that for more than twenty years they had constantly used the passageway for access to their premises, and had maintained at the northerly end thereof, at the point marked A, a door or gate which was locked from time to time.

It further appeared that from Temple Place to the point marked G the passageway was arched and covered by the building of Greene, but that from point G to A it was open, and at the point A there were five stone steps leading up from the passageway to the land of the Wardens and Vestry of St. Paul's Church.

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On May 20, 1891, the Proprietors of St. Paul's Church leased to the defendants, Shepard, Norwell, and Company, a right of way over and through the passageway in question, and on the same day the Wardens and Vestry leased their premises to Shepard, Norwell, and Company for ten years, the lease stipulating that the lessees should erect a building covering the entire premises.

The land was to be excavated for a basement, the southerly end of which, marked E, was to be arched over for a corridor, and Shepard, Norwell, and Company having also leased the premises of Greene, it was further proposed to excavate the northerly end of the passageway from the point G to the level of the floor of the arched corridor, and at the point G to put in stone steps leading from the old passageway into the excavation, and thence by an incline sufficient to carry off surface water, into the arched corridor. Upon the lessees proceeding to excavate the passageway, this bill was brought, and an interlocutory decree was issued, restraining the defendants from altering the grade of the passageway.

The first question at issue is whether the plaintiffs had lost the right of way through the passageway by abandonment, it not being disputed that, unless so lost by abandonment, they had such a right of way as successors in title from John S. Stone; and the second question is whether, if such rights had not been so lost, the proposed alterations were such as would interfere with the rights of the plaintiffs.

There was evidence accompanying the agreed statement of facts, tending to show that in 1866 there was a dwelling-house on the front of the plaintiffs' premises, with a yard in the rear, and a continuous brick wall on the southeast boundary with a gate through it by which access was obtained to the passageway; and that in the same year the defendant Greene purchased the adjoining premises, and lowered the passageway about forty inches. Thereupon the plaintiffs, in the fall of the same year, changed the dwelling-house on their land into a store. At the same time they built an "L," covering the yard in the rear of the main building, and, tearing down the old twelve-inch wall on the passageway, replaced it with an eight-inch solid wall six inches of which projected on the land of the defendant Greene,

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and closed the gate. Subsequently the plaintiffs opened a coal-hole, ten inches by twelve, through the wall of their main building on the passageway. The plaintiffs' premises have been leased continuously since 1866, and the passageway has been constantly used by the tenants for the purpose of carrying coal and certain goods into the store through the coal-hole, and for carrying to the street the ice and snow which accumulated on the roof of the L in the rear, and for going on to the roof of the L to make repairs and to raise the windows for air, as well as for the purpose of passing back and forth between the premises of the plaintiff and another store on Tremont Street, which was carried on by one of the plaintiffs' lessees during his occupation of the plaintiffs' premises. There was also evidence tending to show that the proposed alterations would destroy the use of the rear part of the plaintiffs' building and the use of the passageway, and that in winter the steps leading down into the excavation would be rendered dangerous by the accumulation of ice caused by the drippings from the roofs of the buildings on either side.

F. A. Perry, for the defendant, Reuben Greene.

J. C. Gray & R. S. Gorham, for St. Paul's Church.

W. A. Hayes, (*H. M. Williams* with him,) for the plaintiffs.

HOLMES, J. This is a bill in equity, brought to restrain the defendants from changing the grade of a passageway. The defendants appeal from a decree for the plaintiffs, and the case is before us on agreed facts and evidence. The questions are whether the plaintiffs have lost by abandonment a right which otherwise they are admitted to have, and whether the contemplated change would interfere with the plaintiffs' rights. The facts which are material to our decision are not disputed. The plaintiffs' title is derived from one who owned both the dominant and servient estates. His deed conveyed the easement in question in the following words: "the right of use in common with the abutters thereon of a passageway on the southeast boundary as now laid out, about five feet wide, for any and all lawful purposes, with the express understanding that said passageway shall be maintained and supported at the common expense of all the abutters thereon." The southeast boundary was described in the same deed as "a line running longitudi-

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nally through the centre of the brick wall betwen the premises hereby conveyed and the adjoining estate, about seventy feet." This was is 1833. The first description of the premises by eye-witnesses is as they were in 1866. At that time there was a dwelling-house on the front of the plaintiffs' land, with a yard in the rear, and a continuous brick wall on the southeast boundary. The only access to the passageway was by a gate through the wall of the yard.

In 1866, the defendant Greene, having bought the adjoining land, lowered the passageway about three and a half feet, leaving the plaintiffs' door in the air. Thereupon the plaintiffs built an L, covering their whole yard, and built up the wall solid, and there has been no gate there since. This is relied on as an abandonment. In the same year they opened a coal-hole ten inches by twelve through the wall of their main building on the passageway, but we assume that, if this was wrongful originally, no right to maintain it has been acquired by lapse of time.

The defendants, assuming the state of things in 1866 to have been the same as that in 1833, say that, while a right to pass through the gate may have been granted by implication, the plaintiffs' predecessors got no right to make any other aperture through the party wall, and had no right of way over the six inches, or whatever it may have been, covered by one half of that wall and belonging to the defendants' predecessor. This is tacitly assumed as equivalent to the proposition that the only right in the passageway was in connection with the gate, and the conclusion is drawn that when the gate was closed the easement was abandoned.

Admitting the defendants' assumption as to the facts to be correct, we cannot construe the plaintiffs' rights so narrowly. Whether under such circumstances they had the right to make reasonable apertures, we need not consider further than to say that cases as to party walls not bounding passageways are not conclusive. But we cannot admit that, if in any way the wall should be removed in whole or in part, it would be wrongful in the plaintiffs to pass from their land to the passageway over any part of the land where the wall had been. At all events, and even if the plaintiffs had no right to enter the passageway

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except through the gate or at the end, once in the passageway their use of it would be rightful, even if they had passed through the wall in an unauthorized way. See *South Metropolitan Cemetery Co.* v. *Eden*, 16 C. B. 42. It follows that, if making the coal-hole was unauthorized, and every use of it is a trespass on the land covered by the party wall, still the plaintiffs have been using the way rightfully ever since they closed the gate. They have done it openly, and in a way known in fact to the dominant owner. Therefore the finding that the passageway has not been abandoned was fully justified, and it is further supported by the evidence of other subsidiary uses made of the way. We may go one step further still. If the use of the coal-hole was not only unlawful itself, but made the use of the passageway in connection with it unlawful, nevertheless such a continuous use of the passage, with the knowledge and against the will of the owner of the fee, was notice to him and to all concerned that the plaintiffs' claims on the way were not abandoned. See *Hayford* v. *Spokesfield*, 100 Mass. 491, and cases cited.

The Wardens and Vestry of St. Paul's Church, and their tenants, Shepard, Norwell, and Company, seek to better their case by the fact that the latter have built upon a plan which requires the lowering of the passageway. But if the plaintiffs were required to take any notice of acts done by strangers outside the servient land and in no way interfering with the plaintiffs, the coal-hole was notice to these defendants, as well as to the servient owner, that they built at their peril. No question of laches apart from abandonment is open, nor does it appear that there were any.

It is settled that, if the plaintiffs had a right of way, the defendants have not a right to make any change in its grade which will make the way less convenient to any appreciable extent. *Killion* v. *Kelley*, 120 Mass. 47, 52. *Kelley* v. *Saltmarsh*, 146 Mass. 585. *Nute* v. *Boston Co-operative Building Co.* 149 Mass. 465, 471. It is found that the proposed change would interfere with the plaintiffs' rights, and we are of opinion that the defendants ought not to be allowed to make a compulsory purchase of the right to interfere with them.

Decree for plaintiffs.

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GEORGE A. DAVIS & others *vs.* BAY STATE LEAGUE.

Suffolk. January 31, 1893. — March 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Common Interest in Fund — Suit by one for the Benefit of all — Equity — Reimbursement of Outlay.

When many persons have a common interest in a fund, and one of them, for the benefit of all, brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay.

PETITION in equity, filed on November 16, 1891, and amended petition filed on November 9, 1892, asking for an allowance out of the funds in the hands of the receiver of the Bay State League, for counsel fees and expenses incurred in procuring the appointment of such receiver. Hearing before *Lathrop*, J., who ordered an allowance to be made, and reported the case for the determination of the full court, in substance as follows.

Prior to November 16, 1891, certain members of the Bay State League had obtained evidence of fraud and mismanagement on the part of the officers, and, acting on this information, they retained counsel to begin proceedings against the order. A receiver was appointed, and the counsel rendered valuable services, which resulted in saving a large amount of money for the certificate holders, and other creditors of the defendant order. The expenses were reasonable, and were properly incurred.

S. L. Whipple & R. M. Stark, for the plaintiffs.

No counsel appeared for the defendant.

FIELD, C. J. In *Hobbs* v. *McLean*, 117 U. S. 567, 582, it is said, "When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts." The subject has been carefully considered in *Trustees* v. *Greenough*, 105 U. S.

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527, and *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116. This court has acted on this rule, not only in cases of express trusts under wills or other written instruments, but in a proceeding for the common benefit of many persons interested in the preservation of property. *Amory* v. *Lowell*, 1 Allen, 504, 508. *Kinmonth* v. *Brigham*, 5 Allen, 270. *Frost* v. *Belmont*, 6 Allen, 152, 164. *Bowditch* v. *Soltyk*, 99 Mass. 136. See *Baker* v. *Clarke Institution for Deaf Mutes*, 110 Mass. 88, 92; *Commonwealth* v. *Mechanics' Ins. Co.* 122 Mass. 421; *Cobb* v. *Rice*, 130 Mass. 231, 235; *Clark* v. *Sawyer*, 151 Mass. 64. In all matters of insolvency the court has power under the statutes to award costs to be paid out of the estate which is the subject of the controversy, if justice and equity require it. Pub. Sts. c. 157, § 140. In probate cases the court has by statute the power to award costs and expenses to be paid out of the estate. Pub. Sts. c. 156, § 35. St. 1884, c. 131. See *Willard* v. *Lavender*, 147 Mass. 15.

We have no doubt of the power of the court in the present case to order a reasonable amount to be paid to the counsel for the petitioners out of the fund in the hands of the receiver, and we are of opinion that there should be a decree in accordance with the finding of the justice who reported the case.

So ordered.

WAMESIT POWER COMPANY & another *vs.* STERLING MILLS & another.

LUTHER W. FAULKNER *vs.* WAMESIT POWER COMPANY.

Middlesex. March 21, 22, 1892. — March 4, 1893.

Present. FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Right to draw Water from Canal — Obligation of Grantee — Diversion of Water — Petition for Partition — Parties — Use of Water in Pond — Expense of Apparatus for measuring Water.

The owner of lands on both sides of the Concord River, in 1850, built a dam, a canal, and mills for his own use. Thereafter, from time to time, he conveyed mill sites along the canal, with the right to draw specified quantities of water therefrom when a certain number of cubic feet of water were flowing through it, and proportional fractional parts of any less volume, and covenanted with the

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grantees to enlarge the canal within a specified time. He then, in 1863, sold the residue of his water privileges, subject to the obligation of the grantee to enlarge the canal when necessary, and this residue, in 1866, by mesne conveyances, came into the possession of the plaintiffs. In 1875, the city of Boston, acting under the authority of St. 1872, c. 177, diverted from the Sudbury River, which, by its union with another stream a few miles above the plaintiffs' dam, forms the Concord River, a quantity of water equal to one fifth of the volume of water flowing in the Concord River at the dam. Subsequently the grantees of the residue of the water privileges brought suit against the other mill-owners for a partition of power. Above the dam there was a pond capable of being used as a reservoir, if not constantly drawn upon; and if drawn from only on week days and in working hours it would, when the river was low, enable the mills to receive their full supply on more days than if it was not thus used. There were covenants in the original grants to keep flashboards on the dam during a part of the year, and restrictions as to the use of the water during the working hours of week days, indicating that the grant was not merely of the actual flow of the working hours, but was a right to the flow of the water to be stored in the pond during the other hours of each day and on Sunday. *Held*, that the respondents were entitled to the use of the pond for storage so far as necessary to give full operation to their grants. *Held, also*, that the diminution of the volume of water in the Concord River, caused by the taking by the city of Boston of the water of its tributary, and the payment of damages to the respondents therefor, did not diminish their rights as against the plaintiffs to the quantity of water to which they were entitled under their grants. *Held, also*, that the question of enforcing the plaintiffs' obligation to enlarge the canal, sought to be raised by the answers of the respondents, could not be determined as an incident to the partition, it appearing that other persons whose rights were involved had not been made parties to the proceedings.

The expense of the erection and setting in operation, by a hydraulic engineer appointed by the court, of an apparatus for measuring and dividing the water, should be borne by all the parties to a suit for the partition of a water power, in proportion to the extent of their respective interests.

A second bill in equity, brought by one of the respondents in a partition proceeding against one of the plaintiffs therein to enforce the obligation of the latter to enlarge a canal, was heard and considered in connection with the earlier proceeding. *Held*, that, all the necessary parties not being before the court, that question could not be then determined.

TWO BILLS IN EQUITY. The first bill sought a partition of water power under the provisions of Pub. Sts. c. 178, § 76. The second, brought by one of the respondents in the first bill against one of the plaintiffs therein, sought to charge the latter on its covenant to enlarge a canal. Both cases were heard before *Allen*, J., who in the first case directed an interlocutory decree, and reserved certain questions arising upon the hearing, as well as the whole case upon the report, the evidence of the engineer, the exhibits, and the facts found, for the determination of the full court; the second case was reported for the consideration of the

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full court, without a decree, upon the bill, answer, and certain exhibits. The material facts appear in the opinion.

The cases were argued at the bar in March, 1892, and afterwards were submitted on the briefs to all the judges, except *Holmes*, J.

B. F. Butler & J. N. Marshall, (*P. Webster* with them,) for the Wamesit Power Company.

S. Lincoln, for Luther W. Faulkner.

W. A. Munroe, for the Sterling Mills and the Belvidere Mills.

L. D. Brandeis, for the Lowell Bleachery.

BARKER, J. These cases, heard by a single justice and reported for the decision of the full court, were argued together, and the facts found in each are considered in both.

In the first case, the Wamesit Power Company and the American Bolt Company ask, under the Pub. Sts. c. 178, § 76, for the partition of water power. The other suit is brought by Luther W. Faulkner, one of the defendants in the first suit, against the Wamesit Power Company, and seeks to have that company compelled to enlarge the canal which supplies the mills with water, and to use the pond as a reservoir.

The power is created by a dam on the Concord River, at Whipple's Falls in Lowell, and the mills are located in this order: the Faulkner Mills, the Chase Mills, the Sterling Mills, the American Bolt Company's Works, the Belvidere Mills, the Wamesit Mills, the Wood Mills, and the Lowell Bleachery. The Wamesit Company has other works also above the Faulkner Mills, not operated by water power, but which use water from the canal. The water privileges, except those of the Wamesit Power Company, are held under grants from its predecessors in title, and are rights to draw specified quantities of water per second when 288 cubic feet per second are flowing, and proportional fractional parts of any less volume. The grant of the Faulkner Mills is of 25 cubic feet per second; the Chase Mills, 48; the Sterling Mills, 36; the American Bolt Company, 36; the Belvidere Mills, 27; the Wood Mills, 12; and that of the Lowell Bleachery, 36; leaving ungranted 68 cubic feet, and any surplus beyond 288 cubic feet per second. The conveyances were of lands adjoining or near the canal, with rights to water, and the mills have been built by the purchasers or their grantees. The dam and the canal were built about 1850, by Oliver M. Whipple,

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and the general situation under which he made conveyances may be thus stated. Having several hundred acres of land on both sides of the river, above and below the falls, he built a dam and canal and mills for his own use. Finding a superabundance of water, he caused an estimate to be made of the amount ordinarily available for power; this estimate was 288 cubic feet per second for the usual working hours. He enlarged and lengthened the canal for the purpose of conveying that quantity when the water in the river was even with the top of the permanent dam. He had a right to use eight-inch flashboards during part of the year. From time to time he conveyed mill sites, with rights to draw a maximum quantity of water during eleven and one quarter hours per day for six days in the week; but when 288 cubic feet per second did not run in the canal, the takers were restricted to their proportionate fractional parts of the actual flow. The Wamesit Power Company acquired its title to the dam and the canal on February 10, 1866, before which time the conveyances of the other mill sites had been made.

The Concord River is formed by the union of the Assabet and the Sudbury Rivers at a point, as the crow flies, some twelve or thirteen miles from Whipple's Falls. On January 21, 1875, the city of Boston, acting under the St. of 1872, c. 177, filed a taking of the waters of the Sudbury at a point in Framingham some twelve and a half miles in a direct line from the head of the Concord, and about twenty-five miles in a direct line fron Whipple's Falls. The city was prohibited from reducing the water below a height sufficient to maintain a running stream flowing at least one and one half million gallons a day. The volume which it may divert is equal to one fifth of the volume which would flow in the Concord at Whipple's Falls, if no water were diverted from the Sudbury. All of the then proprietors of the mills now owned by the respondents in the partition suit applied for damages for this taking. During the proceedings the Wamesit Power Company, on December 1, 1875, conveyed to the city "the amount of water which may flow in their said canal, equal to the aliquot part of sixty-six (66) cubic feet of water per second whenever the water is below the level of the permanent stone dam of said company, said aliquot part being that which will flow in and through said canal when the water is below the top

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of said permanent stone dam, being sixty-six two hundred and eighty-eighth parts ($\frac{66}{288}$) of said water then and there flowing, to be drawn by the city of Boston or their assigns, as each may choose to do, through any of the penstocks or flumes of any of the proprietors of water who have now a right to draw the same from said canal other than said Wamesit Power Company, through which said city or its assigns may elect to have said water drawn, whether through one or more of said flumes or penstocks. This right to draw water by said city or its assigns to be exercised only for eleven and one fourth ($11\frac{1}{4}$) hours per day for six (6) days in each week, forever, but not more or otherwise." On October 16, 1876, the city offered to convey to each of the respondents, in mitigation of damages, or in compensation for any water taken, an amount of water in the river, to flow through the raceways and penstocks of each, equal to the entire flow of the Sudbury River to which they were entitled under their several deeds. The offer was not accepted, and damages were awarded and compensation paid to each of the respondents for the taking. On February 23, 1883, the city of Boston released to the Wamesit Power Company all its right, title, and interest in and to the water and water rights conveyed in the deed of December 1, 1875.

Whipple held the title to the dam and the canal until March 20, 1863, when he conveyed to one Patch, who gave him a mortgage back, and who held the equity until he conveyed it to Mr. Butler by a deed dated February 15, 1865. In a deed dated May 18, 1857, of a mill site, now the Sterling Mills, Whipple expressly covenanted to enlarge the canal within seven months from that date, so that it should be of sufficient capacity to carry and deliver not less than 288 cubic feet per second. On August 21, 1862, in a deed of a mill site, now the Lowell Bleachery, he also covenanted to enlarge the canal to the same capacity within six months from that date; and on February 20, 1863, in a deed of a mill site, now part of the Chase Mills, he also covenanted to enlarge the canal to the same capacity within seven months from that date. The conveyance of March 20, 1863, from Whipple to Patch, was made subject to the provision that the grantee should enlarge the canal to the same capacity when needed. In a deed of October 5, 1863, of the mill site, now the Faulkner

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Mills, Patch covenanted within seven months from that date to enlarge the canal to the same capacity; and on February 28, 1864, in a deed of a mill site, now part of the Chase Mills, covenanted to enlarge the canal to the same capacity within seven months from that date. The deed of Patch to Mr. Butler, of February 15, 1865, recited that it was made subject to the obligation to enlarge the canal to the same capacity when needed, and also that Mr. Butler assumes to pay the mortgage to Whipple, and to hold Patch personally discharged thereof. Whipple had transferred to Mr. Butler this mortgage of March 20, 1863, by an assignment dated February 10, 1865, and recorded February 15, 1865; and Mr. Butler, by an assignment dated February 14, 1865, transferred it to one Hildreth, who, on November 3, 1871, made an entry *in pais* to foreclose, and on December 25, 1872, reassigned the mortgage to Mr. Butler. The assignment from Mr. Butler to Hildreth, while dated February 14, 1865, was acknowledged on February 15, 1865, and recorded on November 6, 1871, the deed from Patch to Mr. Butler being dated and acknowledged on February 16, 1865. Neither Whipple, Patch, Mr. Butler, nor the Wamesit Power Company has enlarged the canal, and it is not of sufficient capacity to carry and deliver 288 cubic feet of water per second when the water is as high as the permanent dam.

When the deeds under which the respondents hold their privileges were made by the proprietors of the dam and canal, the grantors were themselves using a portion of the water power. In each of the deeds is a grant of "the right forever hereafter to have said canal and the banks thereof, and the permanent dam owned by the grantor across Concord River, continued for the purpose of affording a water power, and to the extent and with the exceptions and reservations hereinafter contained," save that in the deed of 1862 to the Lowell Bleachery the grant is "for the purpose of affording water for any and all purposes, and a water power."

There are also covenants to forever "keep and maintain in suitable and proper condition and repair the said canal, enlarged to the capacity aforesaid, and the banks and parts and appurtenances thereof; also the said permanent dam and the eight-inch flashboards as they are usually kept thereon, subject to such

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reasonable and temporary interruptions and hindrances as may be necessary in such maintenance and repairs." In none of the deeds is there any express stipulation that the owner of the dam and canal shall not use the water at any time or in any way.

The partition suit was commenced on April 10, 1882. In it the plaintiffs contend that the several respondents are entitled to less water than the amount granted in the deeds under which they hold their respective privileges, because of the taking of the water of the Sudbury River by the city of Boston, and the adjustment and payment to them by the city of their damages, and that each respondent has thus sold or parted with one fifth of the water granted; the respondents deny this position, and ask that the Wamesit Power Company be ordered to enlarge the canal to the capacity agreed upon, and contend that until the canal is so enlarged that company's use of the water should be limited, so that as far as practicable the respondents may each receive as much water as if the canal were so enlarged. They also contend that they are entitled to the benefit of the storage capacity of the pond, and to restrain the Wamesit Power Company from using water outside of usual working hours, if necessary to secure the flow of the full 288 cubic feet during those hours.

At the hearing before the single justice an interlocutory decree was entered, directing an hydraulic engineer to devise and set in operation proper appliances to measure to the parties their respective quantities of water per second, whenever the canal carries 288 cubic feet per second, and their respective proportional amounts whenever the canal does not deliver that amount, any surplus over the 288 cubic feet per second to go to the Wamesit Power Company; and also to ascertain the quantity of water which will run through the canal when the water is at the top of the permanent dam, and at the top of the flashboards, and what widening or deepening of the canal, if any, will be required to give it a capacity to carry and discharge 288 cubic feet of water per second, when the water in the river is as high as the top of the permanent dam, without the water therein at the head of the head raceways of any of the grantees being drawn down more than six inches below the top of the permanent dam. This decree also enjoins the Wamesit Power

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Company from drawing any water otherwise than by drawing its $\frac{66}{288}$ parts during eleven and a quarter hours per day for six days in the week, whenever the water is not running to waste over the dam or the flashboards, until further order of the court, the case being retained with liberty to apply for further orders.

The engineer reported that the canal was not of sufficient capacity to carry and discharge the 288 cubic feet of water per second. He devised and set in operation a plan and appliances for dividing the water, which are approved by all parties.

At the hearing for a further decree, the question was raised as to the amount of water to which each party was entitled, and the respondents contended that they were entitled to the storage capacity of the pond; that the Wamesit Power Company should be ordered to enlarge the canal; that they were entitled to the same part of all the water flowing in the river as they were before the taking by the city of Boston; and that the Wamesit Power Company was bound to pay all the expenses of the engineer and the future expenses of measurements of water. All these questions were reserved for the determination of the full court, and also the whole case upon the report, the evidence of the engineer, the exhibits, and the facts found.

The second bill was brought on July 21, 1882, by Luther W. Faulkner, as owner of the right to draw 25 cubic feet of water per second under his deeds from Patch of October 5, 1863, and of May 11, 1864. The respondent in that bill is the Wamesit Power Company alone. The bill asks that that company may be compelled to enlarge the canal, and that it may be prevented from so using the water for more than eleven and one quarter hours per day as to reduce the water in the canal during those hours to less than 288 cubic feet per second. This case is reported for the consideration of the full court, without a decree, upon bill, answer, and certain exhibits. The exhibits are the deeds in the titles of the respective parties, the statements of the hydraulic engineer in his report in the partition case, and the testimony of two witnesses, D. W. C. Farrington and Frederick Faulkner. Farrington testified, in substance, that he had been connected with the Wamesit Power Company for more than twenty years, commencing within a year or two after its purchase, and that he had since had entire charge of the water

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power and of the distribution of the water; that Faulkner during the same period had many times applied to him to use the water at night; that he permitted him to use it, and that he paid for it without ever making any objection to paying for it; that they had never claimed, to his knowledge, that the Wamesit Power Company did not have the right to sell or use the water; that that company had used the water at night without objection on the part of any one, although it was known that its mills were running at night; that the Sterling Mills had many times, covering considerable space of time, paid them for water to run nights; that the Chase people had done the same thing, and that no other parties on the canal have ever made objection to the Wamesit Mills running nights; that no one ever asked him to widen the canal; that some years ago the Wamesit Company attempted to widen the canal for a supply to its own mill, but he never had any other authority or direction except to bring the water for their use; that while he was widening the canal the Lowell Bleachery Company forbade his doing it, but that he did not stop; that when the Bleachery began to build a canal to take the water from the Wamesit Power Company to their own limit, they had a flume smaller than the Wamesit canal, and had never widened it; and that it had been collapsed for more than fifteen years; and that he never had any conversation in reference to widening the canal with either of the Faulkners. Frederick Faulkner's testimony was, in substance, that, under instructions from his father, Luther W. Faulkner, some twenty-two or twenty-three-years ago, he had asked the agent of the water company to dig out the canal and enlarge it according to the deed; that since that time he had never known of anybody having been formally asked to widen the canal; but that it had been talked of, and brought up in conversation with Farrington.

It will be noticed that, while the Wamesit Power Company at the commencement of the partition suit was in possession of the dam and the canal, and of the other property mentioned in the deed from Mr. Butler to that company of February 10, 1866, on the face of the papers the mortgage given by Patch to Whipple on March 20, 1863, appears to have been assigned by Whipple to Mr. Butler on February 10, 1863, and by Mr. Butler to Hildreth, on February 14, 1865. The deed of the equity to

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Mr. Butler bears date, and appears to have been acknowledged, on the following day, February 15, 1865. But the deed from Patch to Mr. Butler contains in the covenant against encumbrances these words relating to the mortgage, "except a mortgage to Oliver M. Whipple, which said Butler assumes to pay, and to hold the grantor [Patch] personally discharged thereof"; and, by accepting the deed, Mr. Butler contracted to pay off and discharge the mortgage. When, therefore, the mortgage was reassigned to him on December 25, 1872, it would seem to have been his duty to discharge it in performance of this implied contract with Patch, made by his acceptance of the deed of February 15, 1865. See *Rice* v. *Sanders*, 152 Mass. 108. If so, Mr. Butler may have in equity no right to assert a paramount title under that mortgage; but he is not a party to these proceedings, and we cannot, in such a manner as to conclude him, say that it was so. The deed of Patch to Mr. Butler conveyed only the equity, and apparently Hildreth held the mortgage when Mr. Butler conveyed to the Wamesit Company; although his implied agreement may seem to show that he is estopped to set up the mortgage against the Wamesit Company, this cannot be settled in a case in which he is not a party, and has not been heard.

It will also be noticed that the Wamesit Power Company conveyed to the city of Boston, on December 1, 1875, by a deed ratified by Mr. Butler, a right of $\frac{66}{288}$ parts of water in the canal whenever its level is below the top of the dam; and that the reconveyance from the city was not made until February 23, 1883, some months after the commencement of the partition suit. None of the parties, however, have contended that the city of Boston ought to have been made a party, and, as the Wamesit Power Company and the American Bolt Company, the complainants in the partition suit, were both interested in the water power which they ask to have partitioned, we see no difficulty in entertaining the bill, so far as to divide the water power between the parties, nor, as incident to this division, in deciding the questions as to the effect of the taking of the waters of the Sudbury River by the city of Boston, and of the right of the mill-owners to have the use of the pond as a reservoir. There are at present difficulties in the way of deciding whether the Wamesit Power Company is under obligation to enlarge the

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canal. It is evident that not only all the parties to the partition suit are interested in this question, but that, if Mr. Butler has any rights under the Patch-Whipple mortgage, he is also an interested party. The present owners of any portion of the land which was owned by Whipple or by Patch at the time when either made a conveyance from which springs a present right to have the canal enlarged, may also be interested in the determination of this question; because it may be that their lands, as well as those of the Wamesit Power Company, were charged with the obligation to make the enlargement. Under such circumstances we do not feel justified in deciding in the partition suit the question raised by the answers in that suit, as to the obligation of the Wamesit Company to make such an enlargement. The decision of that question is more than an incident to the partition, and can be satisfactorily dealt with only in some proceeding in which all parties interested can be heard, and in which all considerations bearing upon the subject can be brought before the court. See *Worthington* v. *Waring*, 157 Mass. 421. Nor can we decide this question in the suit of Faulkner against the Wamesit Power Company in its present condition, because in that case we have now before us only two of the necessary parties. If the complainant in that action shall see fit so to amend it as to bring in all parties interested in the determination of the question of the right of the plaintiff to have the canal enlarged, the amendment will be allowed; and if, in that case, it shall be finally determined that any of the parties in the partition suit must enlarge the canal, such changes as may be equitable may then be made in the decree in the partition suit, the case being retained for that purpose. We propose, therefore, to divide the water power between the plaintiffs and the respondents in the partition suit without regard to the question whether the Wamesit Power Company is under obligation to enlarge the canal, disposing also of the other questions raised, namely, the effect of the Sudbury River transaction, and the contention that the respondents are entitled to the use of the pond as a reservoir.

The taking of the water of the Sudbury at Framingham had no effect to qualify or diminish the rights of the respondents to any water which comes in the Concord River to the pond. The

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city of Boston did not assume or have the right to take water in Lowell; its action in taking the water of the Sudbury at Framingham undoubtedly lessened the flow of water at Lowell, and so gave the respondents a valid claim for damages, but did not otherwise affect them. The legal measure and quality of their rights in the actual flow remained the same. So far as their easements in the dam and canal at Whipple's Falls are concerned, the transaction between the city and the mill-owners has not affected or altered the respective rights and obligations of the dominant or the servient lands. The water of the Sudbury which passes the point at which it may be diverted is in no way affected. All the water which flows in the Concord River at Lowell is water to which the rights of the mill-owners attach under their deeds, whether it has passed the point in Framingham at which the city may divert the water of the Sudbury, or comes from the Assabet, or from any other tributary of the Concord. The rights and obligations of the parties with reference to the mill privileges at Lowell are no more affected or varied by the action of the city than if the volume of the Sudbury in Framingham had been diminished by local drought, or by the clearing of forests or reclaiming of swamps. To hold otherwise would be to say that the deed of the right to draw a specific number of cubic feet of water per second from the Concord at Lowell was to be construed as a grant to draw one fifth of that number of cubic feet of Sudbury River water, and only four fifths of the same number of cubic feet of all other water in the Concord, and that when, from any cause, the proportion of Sudbury water in the Concord fell short, the right to take water from the canal must proportionally abate, however great the actual supply. If any part of the Sudbury River transaction could affect the rights of these parties *inter sese*, it was the statute taking, and not the payment or receipt of the compensation for the consequent injury, and the taking had the same effect upon all parties concerned at Whipple's Falls, — upon both the plaintiffs and the respondents; that is to say, it affected the value of their estates, but not their nature or limitation. The parties who sold and purchased these lands and water rights knew that the Concord River was a factor to be affected by many causes liable to swell or to diminish its vol-

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ume, and which might affect its flow by operating upon the river itself, or upon its tributaries. They granted and took water privileges or rights in the volume or flow of the Concord River at the dam. They knew that running water in a natural stream, like the unconfined air, is the permanent property of no one, and cannot by any person be impressed with a special quality to be retained after it has passed from his dominion and is again part of a running stream. When in these deeds the parties dealt with the water of the Concord River at Lowell, they did not deal with it as with a cable of five strands, one of which, above the point at which they became the cable, had a separate existence, as the Sudbury River, for instance, and which, as the subject of their deeds, retained its individuality until it passed below Whipple's Falls. They dealt with the water of the Concord River, and not with that of the Sudbury, and the water of the Concord at Lowell is no longer the water of the Sudbury, although operations which affect the volume of the Sudbury may affect the volume of the Concord. If the quantity of water to which the mills were entitled, and which the servient land was bound to allow them, had been made to vary with the volume of the Sudbury, instead of with that of the Concord, the question would have been different; but the rights of the parties under these deeds cannot be so construed. There is no ground for the contention that the respondents have sold one fifth of their right to draw water from the canal at Whipple's Falls. The transaction was wholly different, and the water rights to be now partitioned were not affected in nature or in quality, but simply in value, by the taking of the water of the Sudbury and the payment of compensation therefor.

The mills established under the grants made by Whipple and by Patch are entitled to the benefit of the storage capacity of the pond. When the grants were made, eleven and one quarter hours a day for week days were the usual working hours during which mills of the character established on these privileges were operated. The dam had a pond above it capable of use as a reservoir if not constantly drawn upon; and if drawn from only on week days and in working hours, it would, when the river was low, enable the mills to receive their maximum supply on more days than if continuously drawn upon and not used as

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a reservoir. In this climate there are to be regularly expected seasons when the flow of water is less than the average. This was known to the parties, and the deeds must be read in connection with the situation. The expression in the restricting clause, declaring that if at any time the water in the canal shall not equal two hundred and eighty-eight cubic feet per second, "during the time aforesaid," that is, during the eleven and one quarter hours per day for six days in the week, then the right should be to take only a proportional part of the actual flow, indicates that the grant is not merely of the right of the actual flow of the working hours, but is a right to the flow of the water to be stored in the pond during the other hours of each day and on Sunday. For the words "during the time aforesaid" would be unnecessary upon the other theory of the grant. They imply that the flow during working hours shall be increased by storage to the extent of the capacity of the pond during intervals of non-use. The covenant to keep flashboards points to the same conclusion; it would be of little or no advantage if the mills had no right to have the water stored, or if the owner of the dam could draw down the water in the pond at will. The use of flashboards implies a supply of such a nature as to make husbanding by artificial storage a necessity. The practice of closing gates, except during usual working hours, for the purpose of allowing mill ponds to fill, is customary and legal; *Springfield* v. *Harris*, 4 Allen, 494; *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396, 403; and must have been in the minds of the parties in making the grants. The use of the pond for storage, so far as necessary to give full operation to the grants, was therefore implied in and was conveyed by them. Evidence that the mill-owners have purchased the right from time to time to draw water at extra hours, and that they have never objected to the practice of the Wamesit Power Company of drawing water at night, and never claimed that it did not have the right to draw water at its own pleasure, is of but slight significance as bearing on this question. Whether the mill-owners had a right to have the water stored or not, they could not draw it, except during the usual working hours, without obtaining privileges outside of their grants. The use of water out of hours by the Wamesit Power Company may have been at times of high water, and the circum-

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stances of its use such as to call for no protest from the owners of the other mills.

We consider it equitable that the expenses of dividing the water should be borne by all the parties interested, in proportion to the extent of their respective interests as nearly as may be. If the cost of the apparatus devised and erected by the hydraulic engineer, and of its operation up to the present time, and the amount of the engineer's compensation, are divided in proportion to the amount of water which each party is entitled to take when the whole flow is 288 cubic feet per second, substantial justice will be done.

In the partition suit, a decree may be entered declaring that the respective parties are entitled to draw water from the pond and canal at Whipple's Falls, as follows: That when the state of water in the river is such that the canal will carry 288 cubic feet per second, or more, the Faulkner Mills may draw 25 cubic feet per second during eleven and one quarter hours per day of six days in the week; the Chase Mills, 48 cubic feet; the Sterling Mills, 36 cubic feet; the American Bolt Company, 36 cubic feet; the Belvidere Mills, 27 cubic feet; the Wood Mill, 12 cubic feet; the Lowell Bleachery, 36 cubic feet; the Wamesit Power Company, 68 cubic feet, and any surplus above 288 cubic feet per second. That when the state of water in the river is such that less than 288 cubic feet per second flow in the canal, each of the parties shall draw its proportional part only of the actual flow. That the Wamesit Power Company is perpetually enjoined and restrained from drawing any water from the canal otherwise than by drawing its $\frac{68}{288}$ parts, and any surplus over the 288 cubic feet during eleven and one quarter hours per day for six days in the week, whenever the water is not running to waste over the dam and flashboards. That a scheme for the use of the appliances devised by the hydraulic engineer for dividing the water in accordance with this decree, if not agreed upon by the parties, be settled by a master to be appointed upon request. That the cause be retained, with liberty to either party, upon the determination of the question of the obligation to enlarge the canal, to apply for such modification of this decree as may be equitable, and for any further orders necessary to make the partition firm and effectual. And the decree is to be without prejudice to such

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rights of either party to the cause as may be involved in the question of the right or obligation to enlarge the canal.

In the suit of Faulkner against the Wamesit Power Company, amendments may be made striking out all claims except to the enlargement of the canal, and bringing in as parties all persons or corporations interested in the decision of that question. If such amendments shall not be made, that bill will be dismissed without costs and without prejudice.

So ordered.

JOHN DONOVAN *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. December 2, 1892. — March 7, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Competency of Entries from a Telegraphic Train Report Sheet.

In an action against a railroad company for personal injuries, it was in dispute whether the approach of an inward train at 5.02 P. M. was hidden from the plaintiff by an outward train delivering passengers at the station where the accident occurred. The plaintiff contended that the entries from a telegraphic train report sheet kept in the defendant's train despatcher's office in Boston should not have been admitted in evidence, because they did not tend to show that no outward train was at the station at 5.02, the sheet not purporting to contain reports of all outward trains. *Held*, that the bill of exceptions did not state that this objection was stated at the trial, and that the court could not say that even in this view the entries were immaterial, as upon the plaintiff's testimony he might claim that the outward train, to the presence of which he had testified, was one which should have been reported on the sheet; so that the entries, if competent, were material in that aspect of the case, if in no other.

The plaintiff, in an action against a railroad company for personal injuries, having objected to the competency as evidence of the train sheet kept in the defendant's train despatcher's office, also excepted to testimony explaining how it was made and used, and that it was part of a system customarily employed for thirty years. *Held*, that the evidence was competent to show that the sheet was made in the ordinary course of the defendant's business, and to enable the court and jury to interpret it, and that if the plaintiff desired to have its effect limited he should have requested instructions.

As telegraphic messages are read by sound, as well as automatically recorded in symbols, entries from a telegraphic train report sheet kept in the office of a railroad train despatcher stand upon the same footing as if made from oral statements uttered at the indicated station and audible in the despatcher's office, or

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in view of the symbols in which the manipulation of his instrument by the operator who sends the message makes it visible at the receiving station, the entries are as if made from his signals given at the place of sending and visible in the despatcher's office. They are not, therefore, governed by the rule applied in the case of book charges for goods delivered by a servant whose entries or marks are transferred to his master's account-book.

Where there is no reasonable possibility that any designed untruth had part in placing upon the train sheet kept in the train despatcher's office of a railroad the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and it is sufficiently identified as genuine, it is competent evidence as an act rather than a declaration without the production or proof of the death of the operator who sent the messages; and its entries material to the issue are admissible and proper for the jury, notwithstanding the fact that it was made by the servants of the party by whom it was offered.

When entries from a telegraphic train sheet kept in the train despatcher's office of a railroad were read at the trial of an action against the railroad, the sheet itself was not put in, and the plaintiff made no request, either then or afterwards, that it should go to the jury, but merely objected to the withdrawal of certain entries. *Held*, that this was only an exception to the withdrawal by the court of testimony once admitted, which withdrawal was within the discretion of the presiding justice. *Held, also*, that in any event it was not shown that the plaintiff was harmed, as there was no presumption that one part of such a document contradicts another, and it was nowhere made to appear that the entries withdrawn or the whole sheet tended in any way to discredit the entries admitted.

TORT, under Pub. Sts. c. 112, § 213, for personal injuries occasioned to the plaintiff by being struck by a locomotive engine at East Somerville, at the Perkins Street crossing of the defendant's railroad.

At the trial in the Superior Court, before *Bishop*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

G. A. O. Ernst, (*W. H. Baker* with him,) for the plaintiff.

W. I. Badger, for the defendant.

BARKER, J. The questions for decision arise from the admission, as evidence for the defendant, of entries from a telegraphic train report sheet kept in its train despatcher's office in Boston. It was in dispute whether the approach of an inward train at 5.02 P. M. was hidden from the plaintiff by an outward train delivering passengers at the East Somerville station, in the vicinity of which the accident occurred. Witnesses for the defendant testified that there was no such outward train; that one passed without stopping at 4.52, and that no other passed or stopped until 5.12; and entries from the train sheet, with the testimony of the person who made them, were admitted to

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show that outward trains passed at 4.10, 4.13, 4.21, 4.37, 4.52, 5.12, 5.13, and 5.33 P. M.

1. The plaintiff now contends that the entries should have been excluded, because they did not tend to show that no outward train was at the station at 5.02, the sheet not purporting to contain reports of all outward trains; but the bill of exceptions does not show that this ground of objection was stated at the trial, and from all that appears we cannot say that even in this view the entries were immaterial. Upon the plaintiff's testimony, he might claim to the jury that the outward train, to the presence of which he had testified, was one which should have been reported on the sheet; so that the entries, if competent, were material in that aspect of the case, if in no other.

2. The plaintiff, having objected to the competency of the train sheet, also excepted to the admission of testimony explaining how it was made and used, and that it was part of a system customarily used by the defendant for thirty years. Such evidence was competent to show that the sheet was made in the ordinary course of the defendant's business, and to enable the court and jury to interpret its statements. If the plaintiff desired to have its effect limited, he should have requested such instructions.

3. Some statement of details is necessary in discussing the competency of the entries. The sheet was a form or blank, ruled in columns and cross lines. Each train to be reported had a column designated by its train number, and the names of the stations were in order upon the cross lines. When the sheet was in use, figures were from time to time entered upon it by a person whose duty it was to enter them, and who was the witness producing it. Figures so entered indicated that the train to which that column was assigned left the station specified at the hour and minute denoted by the figures. The sheet was kept under the eye of the train despatcher in his office in the Boston station. When a train left that station the time of departure was entered; when a train left or passed any other station where there was a telegraph, an operator in that station immediately telegraphed to the despatcher's office a statement of the time when the train passed, and also entered the time on a sheet in his own office. The messages so sent to the de-

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spatcher's office were there received from a telegraphic instrument by a telegrapher, who at once made the entries upon the sheet. The sheet thus showed to the despatcher between what stations each designated train was at each moment, and he controlled the movements of trains, using this information; but the person who made the entries had no personal observation of the train, and the truth of the entries rested upon the statements of the operators at the stations. The telegrapher who received the messages and entered them upon the train sheet in the despatcher's office was produced as a witness. The sheet of entries made by the operator at the East Somerville station was also produced and identified, but the East Somerville operator was no longer in the defendant's employment, and was not produced; his handwriting was not proved, and it was shown that his whereabouts was unknown; and upon the plaintiff's objection the East Somerville sheet was excluded. Under the plaintiff's exception to the ruling that the despatcher's sheet was competent evidence, entries from it were then read to the jury, showing the times when trains passed East Somerville.

The failure to produce the East Somerville operator is relied upon by the plaintiff as one ground for his contention that the entries were not shown to be competent evidence. Upon this point he cites the cases of *Kent* v. *Garvin*, 1 Gray, 148, and of *Miller* v. *Shay*, 145 Mass. 162, which held that book charges for goods delivered by a servant whose entries or marks are transferred to his master's account-book are inadmissible, unless the servant is called to support the charges and prove the delivery. But no entries were transferred to the despatcher's sheet from the sheet kept at the East Somerville station. As telegraphic messages are read by sound, as well as automatically recorded in symbols, these entries stand upon the same footing as if made from oral statements uttered at the indicated station, and audible in the despatcher's office; or, in view of the symbols in which the manipulation of his instrument by the operator who sends the message makes it visible at the receiving station, the entries are as if made from his signals given at East Somerville and visible in the despatcher's office. These entries are not, therefore, governed by the rule applied in the cases on which the plaintiff relies.

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4. The principal question is whether the train sheet, with the testimony of the witness who made the entries upon it, was competent evidence for the defendant. It is clear that the sheet was worse than useless if its statements, as seen by the despatcher, were not accurate. Every interest of the defendant demanded that an entry when made should be true, and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the trains at a station, and telegraphed the information to the despatcher's office, or the person who there received the messages and made the entries on the sheet, had any interest to misstate the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum; and every step by which the information spread upon it was gathered, transmitted, and entered was an act performed by some person in the line of his duty and in the usual course of his employment, under a sanction tending to make his statements true; and these acts were so connected with and dependent upon each other as to form parts of one transaction. If the sheet had been used and kept in the course of business by a third person, and not by the party by whom it was offered, there is authority in the decisions of this court for its competency. In *Briggs* v. *Rafferty*, 14 Gray, 525, after evidence that the plaintiff's clerk had marked packages of goods and sent them to be carried by rail to the defendant's place of residence, a servant of the railway corporation produced its regular freight business books, kept by himself, and testified that while he had no personal recollection of the facts, he had no doubt the entries in them were correct, and that the transactions therein recorded took place, and the evidence was held competent to prove the delivery of the goods at their place of destination. As the corporation received the goods in Boston and delivered them in Lawrence, and no other witnesses than the bookkeeper appeared in support of the entries, and as it is apparent that they could not have all been made upon the personal knowledge of the bookkeeper, the evidence was held competent upon no better

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footing than the train sheet in the present case, except that the latter was made by a servant of the party in whose favor it was offered, and is thus evidence which it has made for itself. In *Adams* v. *Coulliard*, 102 Mass. 167, 173, entries from railway freight-books were held to have properly been read to the jury, although it does not appear that the persons who made out the waybills, from which some of the entries were made, were called as witnesses, the court saying that "inferences of fact are always to be legitimately drawn from the known course of business." In these two cases the entries were declarations which tended directly to support the right of the carrier to claim compensation for a service, and one purpose of making them was to preserve evidence in support of a claim. In *Townsend* v. *Pepperell*, 99 Mass. 40, 43, 46, the account of the medical history of the case of a patient in the Massachusetts General Hospital was held competent evidence, when produced by the superintending physician, although he testified that he did not know by whom the entries were made, and that the book in which the account was entered was one of a series in his custody, in which, in the regular course of the business of the hospital, it was the duty of the physicians to enter the history of the cases under their charge; and in *Costello* v. *Crowell*, 133 Mass. 352, 355, a book entry, identified by the testimony of the bookkeeper who made it, was held competent to prove a date, although it does not appear that the fact stated in the entry was within his personal knowledge, and no other witness was called in support of it. In our opinion, because there is no reasonable possibility that any designed untruth had part in placing upon the train sheet the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and because it was an act rather than a declaration, and was sufficiently identified as genuine, it was competent evidence without the production or proof of the death of the operator who sent the messages; and its entries material to the issue were admissible and proper for the jury to consider, notwithstanding the fact that it was made by the servants of the party by whom it was offered.

Entries possibly similar, offered by the corporation by whose servants they were made, were held inadmissible in *Pittsburgh, Cincinnati, & St. Louis Railroad* v. *Noel*, 77 Ind. 110, 121, because,

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in the opinion of the court, neither *res gestæ* nor public records, but private entries in the private books of the company, made by its agents in the course of its business. But in the present case the train sheet, with its entries and the messages from which they were made, were acts rather than mere declarations, and acts done before any controversy had arisen, when all concerned had no interest except to know and to state the truth.

5. After the court, under the plaintiff's exception, had ruled that the train sheet was competent evidence, and the entries showing when the trains passed East Somerville had been read to the jury, those which stated when the same trains left Boston were also read. The plaintiff made no request when the entries were read that the sheet itself should be put into the case. All the entries read were put in during the direct examination of the witness who made them; and his testimony, up to that point, tended to show that he entered the departure of trains from Boston from his own observation. His cross-examination disclosed that the entries of the departures of trains from Boston were copied by him from a book in which they were made by train conductors just before the departure of the trains. In view of this, the court then directed the jury to disregard that part of the testimony which related to the time when trains left Boston, and stated that the part relating to the time when the trains went through Somerville might remain. Counsel for the plaintiff then said, "It seems to me that, if any portion goes in, we are entitled to the whole of it." The presiding justice replied, "I do not think so." To this remark the plaintiff's counsel excepted, adding, "It excludes from us now an opportunity to argue to the jury that his reports coming from Somerville are inaccurate." Further conversation followed as to the fairness of withdrawing testimony once introduced, at the end of which the court ruled that the part of the evidence as to the time of leaving Boston should be disregarded by the jury, and that the other part should stand, subject to the plaintiff's exception; and to this ruling, as we construe the bill of exceptions, it was understood by all that the plaintiff should be considered as excepting, as it was made in reply to a statement of his counsel that he wished to save his rights. All this happened while the defendant was putting in his evidence, and during the exam-

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ination of the witness who was called with the train sheet. The plaintiff now contends that if any part of the sheet was admissible the whole should have gone to the jury, and that the court declined to permit its use to test the accuracy of the entries which remained in the case. The party against whom books are put in evidence may, of course, subject them to scrutiny, or show that they were not fairly kept. *Gardner* v. *Way*, 8 Gray, 189. *Teague* v. *Irwin*, 134 Mass. 303, 307. But the bill of exceptions does not show that the plaintiff laid the foundation for the application of this rule. When entries from the train sheet were read, the sheet itself was not put in, and the plaintiff made no request, either then or afterwards, that it should go to the jury. All that he said upon the subject was in objection to the withdrawal of certain entries. This was merely an exception to the withdrawal by the court of testimony once admitted under an objection taken by the excepting party, and such a withdrawal is within the discretion of the presiding justice, and is not a matter of exception.

But, assuming that it can be inferred from the bill of exceptions that it is now open to the plaintiff to complain that he was not allowed to use the whole sheet to test the accuracy of the entries which remained for the consideration of the jury, his exception cannot be sustained. It is not shown that he was harmed. There is no presumption that one part of such a document contradicts another part, and it is nowhere made to appear to us that the entries withdrawn or the whole sheet tended in any way to discredit the entries which were admitted.

Exceptions overruled.

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MARY E. HILL *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. January 16, 1893. — March 7, 1893.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Contradiction of Witness — Evidence.

In an action for personal injuries occasioned to the plaintiff while alighting from the defendant's street car, it was assumed that the fair construction of the testimony of the defendant's witnesses was that in slowing up and coming to a stop the car made no sudden start forward, but the plaintiff testified that the car did make a sudden start just as she put her right foot to the ground. *Held*, that if the jury believed this statement, and also believed the testimony of the defendant's witnesses, that the plaintiff got off while the car was slowing up and before it had stopped, they would properly find that she was injured by the sudden starting of the car after it had begun to slow up, and before it had come to a full stop, and that, although no witnesses had testified that while the car was coming to a stop it was started up with a jerk, there was evidence from which the jury could find that such was the fact.

TORT, for personal injuries occasioned to the plaintiff while alighting from a street car of the defendant.

At the trial in the Superior Court, before *Hopkins*, J., the plaintiff testified that she was sitting on the end of a seat in one of the defendant's open street cars on the right hand side facing the horses; that, as she approached her destination, she arose, motioned to the conductor to stop the car, and then sat down again; that after the car had come to a full stop she stepped on the running board, and then put her right foot to the ground; that just as her right foot touched the ground, and while her left foot was on the running board and her left hand had hold of the post of the car, the car suddenly started, without any ring of the bell being given, and twisted her round to the left, throwing her to the ground so that she fell on her left side with her left leg under her, severely injuring her. She also testified that she was thrown "with a jerk," that she called it a "jerk," and that the car had stopped before she attempted to leave her seat to alight.

Witnesses for the defendant testified that the plaintiff got off the car while it was slowing up and coming to a stop, and before it had stopped; that it went some three or four feet from the point where she fell before it stopped.

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The defendant asked the judge to rule that "there was no evidence in this case that, while the car was coming to a stop, it was started up with a jerk and the plaintiff was thereby thrown to the ground and injured." The judge so ruled, and the plaintiff duly excepted.

The plaintiff contended, and attempted to argue to the jury, that even if the car had not come to a full stop, yet if the plaintiff was injured by its being carelessly started up while she was alighting, it was a question for the jury whether, under all the evidence in the case, she was in the exercise of due care and entitled to recover. The judge refused to allow such argument, on the ground that there was no evidence to support such a claim, and, at the request of the defendant, instructed the jury that, "as the evidence stands the plaintiff cannot recover unless the jury find that the car had stopped and was standing still when the plaintiff attempted to alight, and that it was started up by the driver before the plaintiff had fully alighted, and that she was thrown to the ground and injured by such starting of the car."

The jury rendered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs to all the judges, except *Holmes*, J.

J. D. Long & A. E. Clary, for the plaintiff.

M. F. Dickinson, Jr. & W. B. Sprout, for the defendant.

BARKER, J. There is no sound reason why the familiar doctrine that a party may contradict, though not impeach, his own witness, should not, if the circumstances are consistent with honesty and good faith, be applied when he is himself the witness. Nor, under the same circumstances, is there any reason why, to prove material facts denied by his own testimony, he may not rely on the testimony of witnesses called by the adverse party. In such a case counsel may properly argue that the jury should find in accordance with part of his client's testimony, and in other particulars should reject it and find in accordance with the testimony of other witnesses, on whatever side called. In other words, the law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be its source. It is rarely that two persons relate alike the

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same occurrence; and in cases of accidental injury it is not unusual for the person injured correctly to perceive and accurately to remember some of the circumstances, and to be unable to give a correct statement of all. Even when witnesses are found to have deliberately testified falsely in some material particular, the jury are not required to reject the whole of their uncorroborated testimony, but may credit such portions as they deem worthy of belief. *Commonwealth* v. *Wood*, 11 Gray, 85, 89, 93. *Commonwealth* v. *Billings*, 97 Mass. 405. They are to weigh all the evidence, and while they may not pervert or distort it by rejecting integral parts of a statement, they may accept or reject each distinct statement. They may thus find proved a state of facts to which as a whole no single witness has testified, and which in some particular is contrary to the account given by every individual witness. If, in this way or otherwise, they arrive at a verdict unsupported by the evidence, or contrary to its weight, the power to set the verdict aside is in the court, and is the remedy provided. But the court has no right to instruct them that there is no evidence of a fact which can fairly be inferred from all the evidence, although contrary to some portion of the testimony of every witness.

Applying these principles to the present case, a majority of the court is of the opinion that there was error at the trial. The jury could find from the plaintiff's testimony, that after she had started to leave the car, and just as her right foot touched the ground, while her left foot was on the running board, the car suddenly started forward without warning, twisted her around, and threw her to the ground with a jerk; consistently with this finding they could reject her statements that it was after the car had come to a full stop that she stepped upon the running board and put her foot to the ground, and that the car had stopped before she attempted to leave her seat to alight. They could the more properly reject these statements because all of the defendant's witnesses testified that she got off the car while it was slowing up and coming to a stop, and before it had stopped, and that it went three or four feet from the point where she fell before it stopped. This was the substance of all the evidence as to how the accident happened.

Assuming that the fair construction of the testimony of the

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defendant's witnesses is that in slowing up and coming to a stop the car made no sudden start forward, it yet remains that the plaintiff testified that the car did make a sudden start just as she put her right foot to the ground; and if the jury believed this statement, and also believed the testimony of the defendant's witnesses, that she got off while the car was slowing up and before it had stopped, they would properly find that she was injured by the sudden starting of the car after it had begun to slow up, and before it had come to a full stop. Thus, although no witnesses had testified that while the car was coming to a stop it was started up with a jerk, there was evidence from which the jury could find that such was the fact.

As the court ruled otherwise, and refused to allow the plaintiff's counsel to argue upon that theory, and instructed the jury that the plaintiff could not recover unless they found that the car had stopped and was standing still when she attempted to alight, a majority of the court is of opinion that the verdict must be set aside. *Exceptions sustained.*

BOSTON INVESTMENT COMPANY *vs.* CITY OF BOSTON.
MASSACHUSETTS REAL ESTATE COMPANY *vs.* SAME.
NORTHERN INVESTMENT COMPANY *vs.* SAME.

Suffolk. January 18, 1893. — March 7, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Foreign Corporation — Taxation of Bank Deposit — Inhabitant — Statute.

A corporation organized under the laws of another State, having an office and doing a large part of its business in a city in this Commonwealth, cannot be taxed on money deposited by it with a national bank in that city, and the provisions of the Pub. Sts. c. 11, § 20, that "All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May, except," etc., do not apply.

KNOWLTON, J. These three cases all present the same questions. Each of the plaintiffs is a corporation organized under the laws of another State, having an office and doing a large part

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of its business in Boston in this Commonwealth. Each of them has paid to the defendant, under protest, a tax assessed on money deposited by it with a national bank in Boston, and the question is whether the defendant could legally assess such a tax.

The defendant in its argument relies solely on the Pub. Sts. c. 11, § 20, which provide that "All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May, except," etc.: and it is contended that the word "owner," like the word "person," may be applied to a corporation, and that a foreign corporation is an inhabitant in any city or town in this State where it has its principal place of business. On the other hand, it may be said that this clause of the statute has never been held to apply to corporations, but has repeatedly been decided to be inapplicable even to corporations organized under the laws of this Commonwealth. Previously to the enactment of the laws for taxing franchises of corporations, it was held that the personal property belonging to a corporation, except machinery, was not taxable to the corporation under this section, but was included in the value of the shares which were taxed to the stockholders. *Salem Iron Factory* v. *Danvers*, 10 Mass. 514. *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181. *Worcester Ins. Co.* v. *Worcester*, 7 Cush. 600. *Dunnell Manuf. Co.* v. *Pawtucket*, 7 Gray, 277. Of a domestic corporation which does business in different cities and towns, it would be impossible to say that it is an inhabitant of one municipality more than of another.

There are additional reasons why this section cannot apply to foreign corporations. The language above quoted implies that the owner has a domicil in some city or town of this State which draws after it, for purposes of taxation and the laws of descent, all his personal property wherever situated, and that he is not a person who has a domicil or who owes allegiance elsewhere. The word "inhabitant" in this statute means one whose domicil is in the place referred to. *Borland* v. *Boston*, 132 Mass. 89. The domicil of a corporation is in the State of its origin, and it retains that domicil irrespective of the residence of its officers or the place where its business is transacted. This has been decided in many cases. Under the Judiciary Act of the United States, which establishes the jurisdiction of the Circuit Courts of the

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United States, it has always been held that a corporation is a citizen of the State under which it holds its charter, without regard to the residence of its officers or members, or to the place where its business is carried on. *Danforth* v. *Penny*, 3 Met. 564. *Blackstone Manuf. Co.* v. *Blackstone*, 13 Gray, 488. *Louisville, Cincinnati, & Charleston Railroad* v. *Letson*, 2 How. 497. *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314. *Lafayette Ins. Co.* v. *French*, 18 How. 404, 408. *Railroad Co.* v. *Harris*, 12 Wall. 65. *Ex parte Schollenberger*, 96 U. S. 369. *Railroad Co.* v. *Koontz*, 104 U. S. 5, 12. *Goodlett* v. *Louisville & Nashville Railroad*, 122 U. S. 391. In *Insurance Co.* v. *Francis*, 11 Wall. 210, it is held that a corporation of one State by engaging in business or acquiring property in another State does not thereby cease to be a citizen of the State creating it. Referring to the State where the corporation is incorporated, the court says: "Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicil at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there." In *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588, is a declaration that "it must dwell in the place of its creation, and cannot migrate to another sovereignty." In *Merrick* v. *Van Santvoord*, 34 N. Y. 208, 218, are these words: "A corporation is an artificial being, and has no dwelling, either in its office, its warehouses, its depots, or its ships. Its domicil is the legal jurisdiction of its origin, irrespective of the residence of its officers, or the place where its business is transacted."

It is clear that neither of the plaintiffs is an inhabitant of Boston within the meaning of the word in the section of the statute which we have quoted. In coming into this Commonwealth to do business, foreign corporations impliedly agree to subject themselves to the conditions imposed by our statutes, and if the Legislature should see fit to tax their money on deposit in banks in this Commonwealth the tax would be legal. *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148. *Oliver* v. *Liverpool & London Ins. Co.* 100 Mass. 531. But at present we have no law under which such deposits can be taxed.

It is not contended, and it could not successfully be contended, that money in bank is "goods, wares, merchandise," or "stock

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in trade," within the meaning of the first clause of § 20 of c. 11 of the Public Statutes. The entry in each case will be,

Judgment for the plaintiff.

A. M. Alger, for the plaintiffs.

A. J. Bailey, for the defendant.

HELEN A. MARVIN *vs.* CITY OF NEW BEDFORD.

Bristol. October 24, 1892. — March 8, 1893.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defect in Sidewalk — Evidence that no Accident has previously happened — Collateral Issues.

It is competent for a jury to find in an action against a city for personal injuries that a hole in a sidewalk nearly circular in form, five and one half inches in diameter one way and six inches the other, and about an inch in depth at the edges and somewhat deeper in the middle, which hole caused the injuries to the plaintiff, is a defect for which the city is responsible under the Pub. Sts. c. 52, § 18.

In an action against a city for personal injuries occasioned by an alleged defect in a sidewalk which the city is bound to keep in repair, it is not competent for the city to show that no accident has previously happened at the place of the alleged defect.

In an action against a city for personal injuries occasioned by an alleged defect in a sidewalk which the city is bound to keep in repair, an official who has had charge of the repair of the streets and sidewalks for some years, and who is familiar with the condition of the streets and sidewalks of many of the cities of the Commonwealth, cannot be asked the questions, "Whether it is common to find in your experience among the cities that you have visited depressions in the sidewalk caused by irregularities in the paving or covering large enough to admit a portion of the foot, — the foot of an ordinary adult?" "Is it an infrequent thing to find depressions to exist between flaggings in different parts of the city?" and, "Is it common for depressions to be found in flagged sidewalks large enough to insert part of the foot?"

TORT, for personal injuries occasioned to the plaintiff in consequence of an alleged defect in a sidewalk of the defendant city.

At the trial in the Superior Court, before *Bishop*, J., it appeared in evidence that Purchase Street was a public way in New Bedford near the centre of the city; that the sidewalk was covered with flagging extending from the line of the stores to the curbing, a distance of about ten feet; that it had been in substantially the same condition for more than five or six years before the

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accident; that one of the flaggings had a hole in it nearly circular in form, five and one half inches in diameter from north to south and six inches from east to west; that the direction of the street was from north to south; that this hole was in the flagging when laid; and that it had originally been filled in by the city with dirt, but by the sweeping of the sidewalk from time to time by the abutters the dirt had been partly swept out, so that at the time of the injury it was about an inch in depth at the edges and somewhat deeper in the middle, the surface being saucer-shaped, one witness testifying that the hole was from an inch and a half to two inches in depth. The hole was about sixteen inches from the edge of the curbing. It was not in the line of the main travel on the sidewalk, excepting when the sidewalk was unusually crowded. The street was largely resorted to for travel, especially upon Saturday evenings. The plaintiff was injured upon Saturday evening at about half past seven. While passing with many other people, exercising due care, upon the sidewalk, she caught her toe in the hole and was thrown down. The entire length of her shoe from the extremity of the heel to the toe was nine inches, and the length of the heel two inches. A number of police officers testified that the place was upon their beat, and that they had passed over that part of the sidewalk many times and had never noticed the hole. It was testified that the written instructions of the police department required police officers to report all defects in streets and sidewalks.

One Boomer, called as a witness by the defendant, testified that he kept a store nearly adjacent to that part of the sidewalk which contained the hole referred to, and that he had known the place for five years. The counsel for the defendant asked him, "Did you ever know of anybody suffering any injury by reason of that depression?" the counsel stating that he proposed to show that the witness had never known of any accident happening from that hole. The judge excluded the question, and the defendant excepted. The judge had previously permitted the defendant to prove, by city officials in charge of the streets and by policemen, that they had never known of any accident happening from this hole, as affecting the question whether the city had reasonable notice. Boomer was not a city official.

One Drake, called as a witness by the city, testified that he

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had had for some years entire charge of the repair of the streets, and that he had visited a great many of the cities of the Commonwealth, and had observed their streets and sidewalks with a view to comparing their condition with that of the sidewalks in New Bedford. Thereupon the following question was put to him: "Whether it is common to find in your experience among the cities that you have visited depressions in the sidewalk caused by irregularities in the paving or covering large enough to admit a portion of the foot, — the foot of an ordinary adult?" The question was excluded, and the defendant excepted.

The same witness testified that he was familiar with the condition of the sidewalks in the city, and that there were seventy-five miles of sidewalks required to be kept in repair by the city, of which fifty were flagged and were similar in construction to the one in question. The following questions were put to him by the city solicitor: "Is it an infrequent thing to find depressions to exist between flaggings in different parts of the city?" and, "Is it common for depressions to be found in flagged sidewalks large enough to insert part of the foot?" Both of these questions were excluded, and the defendant excepted.

At the conclusion of the evidence the defendant asked the judge to rule that no defect had been shown for which the city could be held liable. The judge refused so to rule, and submitted the case to the jury upon instructions not excepted to (excepting as aforesaid) as to what would constitute a defect.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. M. Knowlton & T. F. Desmond, for the defendant.

E. L. Barney, for the plaintiff.

LATHROP, J. 1. The jury were warranted in finding that the hole in the sidewalk which caused the injury to the plaintiff was a defect for which the defendant was responsible under the Pub. Sts. c. 52, § 18; and the court below properly refused to rule, as matter of law, that no defect had been shown. *Street* v. *Holyoke*, 105 Mass. 82. *Ghenn* v. *Provincetown*, 105 Mass. 313. *Loan* v. *Boston*, 106 Mass. 450. *Gerald* v. *Boston*, 108 Mass. 580. *George* v. *Haverhill*, 110 Mass. 506. *Dowd* v. *Chicopee*, 116 Mass. 93.

2. The question put to Boomer was properly excluded. It is not competent in a case of this kind for the plaintiff to show that

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another accident has previously happened at the place of the alleged defect, for the purpose of showing that the place is defective. *Collins* v. *Dorchester*, 6 Cush. 396. *Blair* v. *Pelham*, 118 Mass. 420. Nor is it competent for the defendant to show that no accident has previously happened there. *Aldrich* v. *Pelham*, 1 Gray, 510. *Kidder* v. *Barnstable*, 11 Gray, 342. *Schoonmaker* v. *Wilbraham*, 110 Mass. 134. To admit such testimony would raise a collateral issue, which would have no legitimate bearing on the principal fact in dispute. The defendant contends that the evidence was admissible on the question whether the defect might have been remedied by the exercise of reasonable care and diligence on the part of the city. This hole in the flagging existed when the flagging was laid, five or six years before the accident. During this time it was more or less filled in with dirt, which was liable to be swept out when the sidewalk was swept. It could hardly be contended that such a condition of things could not be remedied by the exercise of reasonable care and diligence. However this may be, it is enough to say that the evidence sought to be introduced has no legitimate bearing upon this issue.

3. The questions put to the witness Drake were properly excluded. Whether it was common to find depressions in the sidewalk in other cities, or in New Bedford, large enough to admit the portion of a foot of an ordinary adult, had no tendency to show either that the hole in question was not a defect, or that the defect, if it existed, could not have been remedied "by reasonable care and diligence" on the part of the defendant. Such questions, if allowed to be put, would raise collateral issues not pertinent to the issues in the case. *Bacon* v. *Boston*, 3 Cush. 174. *Bliss* v. *Wilbraham*, 8 Allen, 564. *Packard* v. *New Bedford*, 9 Allen, 200. *Hinckley* v. *Barnstable*, 109 Mass 126. *Schoonmaker* v. *Wilbraham*, 110 Mass. 134. *George* v. *Haverhill*, 110 Mass. 506.

The evidence in the case of *Raymond* v. *Lowell*, 6 Cush. 524, 531, related merely to proof that in other towns or cities, as well as in Lowell, the edge of the curbstone was not on the same level as the carriageway, "which," as the court remarks, "was in fact a matter very obvious and known to everybody without any testimony." The remark of the court that the evidence was "admissible, as bearing upon the question of ordinary care," has

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generally been considered as relating to care on the part of the plaintiff. See cases last above cited. That such evidence is not admissible on this issue, unless the plaintiff has knowledge of the other defects, is well settled. *Hinckley* v. *Barnstable*, 109 Mass. 126. *Schoonmaker* v. *Wilbraham*, 110 Mass. 134. In *George* v. *Haverhill*, *ubi supra*, it was held that evidence that witnesses had seen depressions and elevations in sidewalks of the size of the one in question in that case was too indefinite and remote, as affecting the question of care on the defendant's part. It is true that in that case it was said that evidence of the condition of sidewalks in other cities was inadmissible on the question of care on the part of the defendant, because that was not the test of the liability. It is also true that, under the Pub. Sts. c. 52, § 18, reasonable care on the part of a town or city is a test of liability. But such evidence has been held inadmissible on the broader grounds above stated. See cases above cited.

Exceptions overruled.

CLARA E. PATCH & another *vs.* DENNIS C. COLLINS.

Middlesex. January 23, 1893. — March 8, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Mechanics' Lien — Equity — Tender — Injunction.

B, having contracted to build A. a house, made a sub-contract with C. for a certain sum, payable when the work was done. A. obtained B.'s consent that three hundred dollars of the principal sum due from A. to B. should be paid to C. "on account of the labor done and to be done under the sub-contract." The money was tendered to C., and he declined it. C.'s work was not then completed, and there was nothing to show that anything was due him. A. brought a bill in equity against C. to restrain him from enforcing a mechanic's lien by sale of the premises so far as the same was claimed for the sum tendered. *Held*, that if the amount tendered was in fact then due C., and C.'s contention was sound that the tender of an amount due less than the total sum discharges the lien *pro tanto*, although not accepted, A. could have pleaded this in defence of the action brought to enforce the lien, and if, on the other hand, there was nothing due C. at the time of the tender, he was not obliged to receive the money on account.

BILL IN EQUITY, to restrain the defendant from enforcing a mechanic's lien by the sale of the premises, or otherwise, so far

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as the same was claimed for a certain sum tendered to the defendant and declined by him. The defendant demurred for want of equity. In the Superior Court the demurrer was sustained, and the bill was dismissed; and the plaintiffs appealed to this court. The facts appear in the opinion.

G. W. Parke, for the plaintiffs.

M. F. Farrell, for the defendant.

LATHROP, J. We see no ground upon which this bill can be maintained. The defendant made a sub-contract to furnish the materials and labor necessary in the mason-work of the house of the first named plaintiff, for the sum of nine hundred and twenty-five dollars. The bill does not set forth when this amount was payable, but we assume that it was when the work was done. Subsequently he received three hundred dollars from the general contractor, which he applied to the payment for the materials. Some months later, when the principal sum was coming due from the plaintiff to the general contractor, she obtained the latter's consent that three hundred dollars of the sum should be paid to the defendant "on account of the labor done and to be done under the sub-contract." This money was tendered to the defendant, "to be applied on account of labor furnished or performed by him." The defendant's work was not then completed, and, so far as appears, nothing was then due him. It is true that the bill alleges that this sum was then due him for labor; but, taking this allegation in connection with the other allegations of the bill, we think it is fairly to be construed to mean that the defendant had earned or expended this amount for labor. If this amount was in fact then due him, and the defendant's contention is sound that the tender of an amount due less than the total sum discharges the lien *pro tanto*, although not accepted, the plaintiff could have pleaded this in defence of the action brought by the defendant in the Superior Court to enforce the lien given him by the Pub. Sts. c. 191, § 2.

If there was nothing due the defendant at the time of the tender, we are of opinion that he was not obliged to receive the money on account.

In this view of the case, it is unnecessary to consider whether, as the plaintiff is not now prepared to pay the money tendered, a court of equity should aid her. *Bill dismissed.*

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LINCOLN BROWN *vs.* HARLAN P. BOYD.

Suffolk. January 24, 1893. — March 8, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Dissolution of Partnership — Bond — Equity.

A bill in equity brought by A. against B. alleged that they were partners, that, on the day of the dissolution of the partnership, A. as principal, with C. as surety, executed a bond to B. for the faithful performance by A. of the contracts of the late firm with its customers; that, to procure C. to sign, A. had to deposit with him a certain sum of money; that the conditions of the bond had all been performed; that B. had had notice and been offered proof thereof, which he had refused to examine; that he had refused to give up the bond on request; and that C. had refused to deliver the sum paid to him until the bond had been exhibited to him discharged by B. The prayer was that B. be ordered to deliver up the bond discharged. *Held*, that the bill was rightly dismissed, with costs

LATHROP, J. This is a bill in equity which comes before us on demurrer. The bill alleges that the plaintiff and defendant were partners, and dissolved partnership on July 27, 1891; that on that day the plaintiff as principal, with one Sholes as surety, executed a bond to the defendant in the sum of four thousand dollars, conditioned for the faithful performance by the plaintiff of the contracts entered into by their late firm with all customers of the said firm, and more particularly a contract made with one Freeman; that, to procure Sholes to sign the bond as surety, the plaintiff was obliged to deposit with him the sum of one thousand dollars; that the conditions of the bond have all been performed; that the defendant has had notice thereof and been offered proof thereof, which he refuses to examine; that he has been requested to give up the bond, but refuses to do so: and that Sholes refuses to deliver up the one thousand dollars until the bond has been exhibited to him discharged by the defendant. The prayer of the bill is that the defendant be ordered to deliver up to the plaintiff the bond, cancelled or discharged. The bill is dated October 11, 1892.

That equity has jurisdiction, under some circumstances, to order an instrument valid in its inception to be delivered up after it has ceased to be operative, is unquestionable. "The

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exercise of this power," says Chancellor Kent, in *Hamilton* v. *Cummings*, 1 Johns. Ch. 517, 523, "is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and . . . the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation."

Where the existence of the instrument acts as a cloud upon the title of the person executing it, or subjects him to the danger of some future litigation "when the facts are no longer capable of complete proof, or have become involved in the obscurities of time," is stated by Mr. Justice Story as the ground for affording relief in equity. 2 Story Eq. Jur. § 705. See also *Webb* v. *Noah*, 1 Edw. Ch. 604, 615; *Hughes* v. *Sanders*, 3 Bibb, 360; *Foley* v. *Kirk*, 6 Stew. 170, 174. Generally, however, where the instrument is a bond, equity will not interfere, but will leave the obligor to his defence at law to an action brought on the bond. *Strong* v. *M'Donald*, 1 Root, 364.

The danger of future litigation when the facts may be no longer capable of proof, which is stated by Mr. Justice Story, *ubi supra*, as a ground of relief in equity, would seem to have little weight in those jurisdictions where, as in this Commonwealth, evidence may be perpetuated. Pub. Sts. c. 169, § 45. In New York, the existence of such a statute has been held a sufficient reason why relief in equity on account of the danger of future litigation should not be granted. *Fowler* v. *Palmer*, 62 N. Y. 533.

In the case at bar we see no reason why the defendant should be compelled to try in a court of equity the question whether the plaintiff has kept and performed the contracts made with the customers of the firm. If the fact be as the plaintiff alleges, the retention of the bond by the defendant can do the plaintiff no harm, unless it arises from the fact that the plaintiff has entered into a contract with a third person. The defendant was not a party to that contract, and it does not even appear that he had knowledge of it, if this would be of consequence, and his rights should not be affected by it.

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The decree of the Superior Court dismissing the bill, with costs, must be affirmed. *So ordered.*

S. J. Thomas, for the plaintiff.

J. H. Hopwood, for the defendant.

MARY A. McLEAN *vs.* FISKE WHARF AND WAREHOUSE COMPANY.

Suffolk. January 12, 1893. — March 14, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Election of Counts — Repairs by Landlord — Evidence — Collateral Issue.

Where there is nothing to submit to the jury under the second count of a declaration containing two counts, stating different grounds for recovery for the same cause of action, the plaintiff is not harmed by the ruling requiring him to elect, at the close of his evidence, on which count he will rely.

A. brought an action for personal injuries against B., the owner of the premises where the accident happened. The premises were let to C. That part of the evidence most favorable to A., considered by itself, had no tendency to show that B. undertook to have an oversight of the premises, and to keep them in safe and proper condition for C. and his tenants, without notice of defects or special request. *Held*, that the case was rightly withdrawn from the jury.

Evidence offered to contradict a witness in regard to a matter outside of the issue, in which his answers had been drawn out in cross-examination, is rightly excluded.

TORT, for personal injuries. The declaration contained two counts, the first of which was as follows:

"The plaintiff says that the defendant is a corporation, duly established by law, and is the owner of certain buildings on Commercial Street in the city of Boston, occupied by various tenants; that on or about the second day of January, A. D. 1890, the plaintiff occupied a portion of the building numbered 453 in the numbering of the stores and doorways on said Commercial Street, and as such occupant or tenant used in common with the other tenants of said building a certain outhouse or privy, located in the rear or yard of said building; that on or

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about the said date the plaintiff visited said privy and used due and proper care in so doing, but the floor of said privy or outhouse, which was negligently suffered by the defendant to be and remain out of repair, then sank and fell, precipitating the plaintiff into the opening, and causing her severe bodily pain and injury, and causing her to suffer, and she continues to suffer from the effects of said fall."

The answer was a general denial.

Trial in the Superior Court, before *Bond*, J., who, at the close of the plaintiff's case, directed a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in January, 1893, and afterwards was submitted on the briefs to all the judges.

J. P. Leahy, for the plaintiff.

H. G. Allen, for the defendant.

KNOWLTON, J. The plaintiff was not harmed by the ruling requiring her to elect, at the close of her evidence, on which count she would rely. Where the declaration contains two counts stating different grounds for recovery for the same cause of action, it is ordinarily in the discretion of the presiding justice to determine whether the plaintiff shall elect between them or be permitted to go to the jury on both. In the present case, the second count alleged that the defendant, prior to the accident, had undertaken to make repairs on the building, and had made them negligently. There was no evidence that the defendant or anybody else had ever repaired the building, and there was nothing to submit to the jury under this count.

The next question is whether there was evidence to warrant a verdict for the plaintiff under the first count. The defendant was the owner of the premises where the accident happened, and there was evidence from several witnesses, which was uncontradicted, that five houses, including these premises, had been let to one Murphy in 1885, and had been in his control as tenant of the defendant all the time from that year to the day of the accident, which occurred in 1890, and that by the contract of letting the defendant was not required to make any repairs. It was also undisputed that the plaintiff hired the premises from Murphy and paid rent to him, taking receipts signed in his name, and that she had all her dealings in regard to the tenement with him,

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and that he ordered her out a short time before the trial. The plaintiff relies on evidence that the carpenter who assisted Murphy in repairing the privy was regularly employed by the defendant, but the only evidence in regard to the circumstances under which he did the work was that Murphy paid him for it by giving him some tools, and that the defendant's agents did not pay him, and never told him to do any work on any part of the premises hired by Murphy. The testimony of the witness called by the plaintiff to contradict this carpenter was not affirmative evidence, and cannot be considered in support of the proposition which the plaintiff seeks to maintain.

It is well settled that, in the absence of an express contract, a landlord is under no obligation to make repairs on real estate in the possession of a tenant, and the fact that at special request he makes some repairs while his tenant is holding at will is no evidence that he contracted in the beginning to keep the premises in good condition. He may, and often does, voluntarily make particular repairs for the preservation of the estate and the benefit of the reversion, as well as to induce the tenant to continue a tenancy which otherwise he might terminate on short notice. *McKeon* v. *Cutter*, 156 Mass. 296. The evidence tended to show that after the first year Murphy was a tenant at will of the defendant, and there was evidence that during seven years before the trial of this case the defendant had slated one roof and had shingled another, and had made some special repairs three or four times. But all the direct evidence was to the effect that the defendant did not make ordinary repairs, and was under no obligation to make repairs, and that Murphy made them himself.

If we take that part of the evidence most favorable to the plaintiff and consider it by itself, it has no tendency to show that the defendant undertook to have an oversight of the premises in Murphy's possession, and to keep them in safe and proper condition for him and his tenants, without notice of defects or special request. If repairs had been made by the defendant with such frequency and under such circumstances as to furnish evidence of an agreement between the parties that the landlord should make repairs, the natural inference would be, in regard to portions of the property in use and peculiarly under the observation of the tenant, that the landlord was to repair on notice of defects,

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and not that he should assume to inspect the property so frequently as to discover and remedy all defects without notice. *Hutchinson* v. *Cummings*, 156 Mass. 329. A majority of the court are of opinion that the case was rightly withdrawn from the jury.

The evidence offered to contradict Murphy was rightly excluded. It was in regard to a matter outside of the issue, in which his answers had apparently been drawn out in cross-examination, and it was not competent for the plaintiff to contradict him.* *Exceptions overruled.*

FIRST CONGREGATIONAL CHURCH OF ROCKLAND *vs.* HOLYOKE MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

SAME *vs.* SUN FIRE OFFICE COMPANY.

SAME *vs.* QUINCY MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* FITCHBURG MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Suffolk. January 16, 17, 1893. — March 17, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Insurance on Building — Increase of Risk — Meaning of "kept" on the Premises — Ordinary Repairs — Question for the Jury — Testimony of Experts — Discretion of Presiding Justice.

A policy of insurance upon a church built of wood provided that the policy should be void if without the assent in writing or in print of the company "the situation or circumstances affecting the risk shall, by or with the knowledge, advice,

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* The evidence so excluded was as follows. Murphy having testified that he had never refused to paper the tenement of Mrs. McLean until he first saw the treasurer of the defendant corporation about it, and that when requested to repair the steps, shed, and blinds he had never stated that he must first see the treasurer, the plaintiff offered to prove by Mr. McLean that he had stated that he could not paper the tenement or repair the steps, shed, or blinds until he had seen the treasurer.

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agency, or consent of the insured, be so altered as to cause an increase of such risk." While a naphtha torch was being used to burn off the old paint preparatory to repainting, the building caught fire and was entirely consumed. The question was whether a change of this kind, increasing the risk with the knowledge, agency, and consent of the insured was an alteration of "the situation or circumstances affecting the risk" within the meaning of the policy. *Held*, that as the change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by fire, the change of the condition was sufficiently long continued to be deemed a change in "the situation or circumstances affecting the risk."

The word "kept," as used in a policy of insurance which provides that it shall be void if certain oils and burning fluids shall be kept on the premises, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time.

In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions to the effect that the policy shall be void if, without the assent in writing or in print of the company, naphtha or other oils or burning fluids shall be "used by the insured on the premises insured," should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. Hence, where paint was removed by the use of a naphtha torch from the outside of a building covered with soft pine sheathing tongued and grooved and put on horizontally, and the weather was hot and dry and the boards shrunken so that in some places there were cracks, and the building caught fire and was entirely consumed, the questions for the jury are, "Whether the company, if familiar with the condition of the building and the methods usually adopted in making repairs, should have contemplated when it issued the policy that the insured would burn off the paint at such a time and in such a way as it did? Was such a use of naphtha a reasonably safe and proper way of making repairs on the building under the circumstances?"

A policy of insurance contained a provision that it should be void if, without the assent in writing or in print of the company, naphtha should be used by the insured on the premises insured. While a naphtha torch was being used to burn off the old paint preparatory to repainting, the building caught fire and was consumed. *Held*, in an action on the policy, that, as bearing on the question whether the use of a naphtha torch would increase the risk, the company might show, if it could, by an expert in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use; but that the expert could not be asked his opinion as an expert as to the actual effect of the use of naphtha in reference to danger from fire.

A policy of insurance contained a provision that it should be void if, without the assent in writing or in print of the company, naphtha should be used by the insured on the premises insured. While a naphtha torch was being used to burn off the old paint preparatory to repainting, the building, which was covered with soft pine sheathing, tongued and grooved and put on horizontally, caught fire and was consumed. *Held*, in an action on the policy, that the testimony of experts in regard to the proper and usual way of removing paint was rightly admitted. *Held, also*, that, as it is largely within the discretion of the judge to determine how far to go into the trial of collateral issues, he could exclude the question, "Whether or not the sheathing of the church caught fire at any time previous to the day the church was burned by the use of the torch?"

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KNOWLTON, J. The policies of insurance sued on in these six cases are all alike in containing provisions which are relied on in defence, and which are as follows: "This policy shall be void if . . . without the assent in writing or in print of the company . . . the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The property insured was a church edifice, built of wood, not clapboarded, but sheathed horizontally with grooved and tongued sheathing, closely matched together, and painted and sanded on the outside. The paint had peeled and curled, and at the time of the fire the plaintiff was repainting the building. Three trustees had "the control and care of all the real estate belonging to the church," and were authorized to provide for its insurance and repairs. They arranged with one Gilson, a painter, to paint the outside of the building by the day, at the rate of $3 per day for himself, and $2.75 per day for his men, the trustees furnishing the paint stock, and he furnishing his own brushes, ladders, and other tools of trade. It was also arranged that he was to burn off the old paint with a torch, or some such implement, preparatory to repainting. He procured for the purpose a naphtha torch, so made as to hold a quart or more of naphtha, with a handle at one side of the receptacle, and a tube extending out on the opposite side through which a flame could be emitted, produced by the gas from the naphtha and compressed air. It could be made to send this flame out in a straight line about two feet, and when in use it made a noise "similar to a steam-engine." The flame could be regulated by a thumb-screw so as to extend not more than six or eight inches beyond the end of the tube, and the torch was used by holding it in the left hand and passing it along, so that the flame from the tube would blister or burn the paint, which could then easily be scraped off. The evidence tended to show that the trustees knew that Gilson was to burn off the paint, and left it to him to determine exactly in what way he would do it. One or more of them saw the torch which was used before he began to use it, and they repeatedly saw him using it before the fire.

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When the work had been going on about four weeks, the torch, according to the testimony, having been used daily during all the working days, the building caught fire on the edge of a board where there was a crack and where the torch had just been used, and was entirely consumed. This was on the 16th day of July, 1890, and there was evidence that the weather was hot and that the boards were very dry. There was also evidence that, as a protection against fire, a pail of water was kept on hand while the work was going on. The evidence tended strongly to show that the danger of a conflagration was greatly increased by the use of the naphtha torch on the dry, inflammable, soft pine boards, with their shrunken joints.

If the risk was increased by the use of the torch, it seems, on the undisputed facts, that it was by the agency and with the knowledge and consent of the insured, for the officers represented the plaintiff in the management of the property, and saw the torch in use, and they authorized the use of it before the work was begun. *National Security Bank* v. *Cushman*, 121 Mass. 490. Gilson was their agent acting in the exercise of his discretion and with full authority in procuring and using the naphtha, and on the uncontradicted evidencethe use of naphtha by him was a use of it by the insured, within the meaning of the provision quoted from the policies. Was a change of this kind increasing the risk with the knowledge, agency, and consent of the insured, an alteration of "the situation or circumstances affecting the risk," within the meaning of those words in the policies? Those words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision. But this change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by the fire. We are of opinion that the change of the condition was sufficiently long continued to be deemed a change in "the situation or circumstances affecting the risk." In the case of *Lyman* v. *State Ins. Co.* 14 Allen, 329, it was held that an alteration of a building which increased the risk for three weeks was enough to render the policy void under a similar clause.

We find no evidence that naphtha was kept on the premises. The word "kept," as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a

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considerable period of time. See *Williams* v. *New England Ins. Co.* 31 Maine, 219; *O'Niel* v. *Buffalo Ins. Co.* 3 Comst. 122; *Williams* v. *Fireman's Fund Ins. Co.* 54 N. Y. 569; *Mears* v. *Humboldt Ins. Co.* 92 Penn. St. 15; *Putnam* v. *Commonwealth Ins. Co.* 18 Blatchf. C. C. 368.

For nearly four weeks naphtha was used within a few inches of the outer wall of the building to produce the flame which was brought in contact with the building. It would be a narrow and unreasonable construction of the policies in reference to the purposes for which the words were inserted to say that the use of naphtha was not "on the premises" because while in liquid form it was a few inches outside of the wall, when it was made to produce an effect directly on the premises by burning it in the form of gas and directing it against the building.

On the undisputed facts as stated in the bill of exceptions, the only ground on which the plaintiff could fairly ask to present a question to the jury is upon its contention that the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose. *O'Niel* v. *Buffalo Ins. Co.* 3 Comst. 122. *Dobson* v. *Sotheby*, Mood. & Malk. 90. *Franklin Ins. Co.* v. *Chicago Ice Co.* 36 Md. 102. *Billings* v. *Tolland County Ins. Co.* 20 Conn. 139. *Mears* v. *Humboldt Ins. Co.* 92 Penn. St. 15. *Williams* v. *New England Ins. Co.* 31 Maine, 219. *Putnam* v. *Commonwealth Ins. Co.* 18 Blatchf. C. C. 368. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are

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considering should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. We are therefore of opinion, that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void. But the questions submitted to the jury on the answers to which verdicts were ordered for the plaintiff did not sufficiently present the matters of fact in issue. The only question bearing on the most vital part of the issue was as follows: "Was the method used the method ordinarily pursued to remove the paint on the outside of a building preparatory to scraping it off to repaint it?" The order of verdicts for the plaintiff on an affirmative answer to this question assumed that the removal of the paint from this building was reasonably necessary to the repair of the building. It also assumed that this building, in reference to the danger from moving the flaming torch all over its external surface, was like ordinary buildings. Many buildings are built of brick, and painted on the outer walls. Many others are clapboarded in such a way as to make a very close, tight covering. If this is the method ordinarily pursued when paint is to be removed from the outside of a building, it does not follow that it is ordinarily pursued when the building is covered with soft pine sheathing, tongued and grooved and put on horizontally, and when, at the time of doing the work, the weather is very hot and dry, and the boards shrunken so that in some places there are cracks.

Gilson testified that, although he had been a house painter in Rockland twenty-five years, he had never burned off paint from the outside of a building before. The architect who was consulted by the plaintiff in regard to repairs advised removing the old paint by the application of a paint remover, which was a preparation to be applied by a brush or a sponge. The use of naphtha and the increase of risk by an alteration of the circumstances affecting it were permitted under the implied exception only when reasonably required for the making of repairs. If it was unreasonable to use naphtha under the circumstances, at the time and in the manner disclosed by the evidence, the use was not within the exception, and the policies became void. The question for the jury was whether the defendants, if familiar with the condition of the

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building and the methods usually adopted in making repairs, should have contemplated when they issued the policies that the plaintiff corporation would burn off the paint at such a time and in such a way as it did. Was such a use of naphtha a reasonably safe and proper way of making repairs on this building under the circumstances? The questions submitted to the jury were not equivalent to these.

As bearing on the question whether the use of a naphtha torch would increase the risk, the defendants might show, if they could, by an expert in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use. The relative rates usual for insurance under different circumstances are treated as facts which a jury may consider in determining the degree of the risk. *Webber* v. *Eastern Railroad*, 2 Met. 147. *Luce* v. *Dorchester Ins. Co.* 105 Mass. 297, 301. *Cornish* v. *Farm Buildings Ins. Co.* 74 N. Y. 295. *Hartman* v. *Keystone Ins. Co.* 21 Penn. St. 466. *Planters' Ins. Co.* v. *Rowland*, 66 Md. 273. The other question to the witness, which called for his opinion as an expert as to the actual effect of the use of naphtha in reference to danger from fire, was incompetent. *Lyman* v. *State Ins. Co.* 14 Allen, 329.

The testimony of experts in regard to the proper and usual way of removing paint was rightly admitted.

It was within the discretion of the court to exclude the question, "Whether or not the sheathing of the church caught fire at any time previous to the day the church was burned by the use of the torch?" It might have caught fire in such a way as would have no tendency to show that the use of the torch was an unreasonable and improper method of making repairs. On the other hand, the circumstances may have been such as to make it a proper fact for the consideration of the jury. It is largely within the discretion of the court to determine how far to go into the trial of collateral issues.

Verdicts set aside.

A. Hemenway, for the defendants.

W. A. Gaston & L. S. Dabney, for the plaintiff.

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COMMONWEALTH *vs.* CHARLES S. JOSLIN.

Bristol. October 24, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Petition to establish Exceptions — Use of Intoxicating Liquors for other than Medicinal, Mechanical, or Chemical Purposes — Purchase of Intoxicating Liquors for authorized Purpose — Evidence — Reasonable Cause to know — Condition of License — Sales to a Minor — Agent of Disclosed Principal.

A defendant filed a bill of exceptions, which the judge of the Superior Court disallowed on the ground that it was not conformable to the truth, and his certificate stated in detail the amendments which he deemed necessary. The defendant thereupon filed in the Supreme Judicial Court a petition to establish the truth of his exceptions, and a commissioner was appointed who reported in the defendant's favor. The defendant assented to the corrections and additions suggested in the judge's certificate, but the commissioner failed to incorporate them in the bill. At the hearing before the full court the defendant consented to have them so incorporated. *Held*, that it was the duty of the commissioner to consider the statements of the judge's certificate and that the bill of exceptions, amended in conformity thereto, should be established.

A retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, has no right to sell intoxicating liquor, knowing or believing that the purchaser intends to use it for other than medicinal, mechanical, or chemical purposes, even though the purchaser signs a certificate, in the form prescribed by the statute, falsely stating that he wants the liquor for one of the purposes for which it may lawfully be sold.

If a retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, sells intoxicating liquor, intending that it shall be used for other than medicinal, mechanical, or chemical purposes, the sale is nevertheless lawful provided the purchaser in fact buys for an authorized purpose. (KNOWLTON, J. dissenting).

At the trial of an indictment against a retail apothecary who held a license of the sixth class under St. 1887, c. 431, charging him with unlawfully exposing and keeping for sale intoxicating liquors, it appeared that the defendant had made a number of different sales to each of several persons upon certificates signed by them, stating that they wanted the liquor for medicinal purposes. Evidence of a witness for the government, who was well acquainted with the different purchasers and had seen each frequently during the period covered by the alleged illegal sales, that they all appeared to be well, so far as he could see, and that he did not know of their having any sickness or of any sickness in their families, was *held* to be relevant either to the belief of the defendant as to the purpose for which the liquor was wanted, or to the actual purpose of the purchasers in buying it, and therefore rightly admitted. Evidence of the purchasers themselves as to the real purposes for which they bought the liquor was, for the same reason, rightly admitted.

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In the criminal law "reasonable cause to know" is not equivalent to actual knowledge.

A retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, was indicted for exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same, and the government relied on evidence of sales made by the defendant to persons who signed false certificates, stating that they wanted the liquor for medicinal purposes, when they really wanted it for a beverage. *Held*, that, in order to find that the sales were unlawful, it was not sufficient for the jury to find that the defendant had "reasonable cause to know" that the liquor was really wanted for a beverage, but that they must find that the defendant did in fact have the guilty knowledge or belief.

A retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, is forbidden, by Pub. Sts. c. 100, § 9, cl. 4, to make any sale or delivery to a minor, "either for his own use, the use of his parent, or of any other person." This is a condition of his license within which the holder is bound to keep at his peril, and, if a sale has been made to a person who is in fact a minor, evidence offered for the purpose of showing good faith that the minor told the druggist or his clerk that he was of age is immaterial to the question of criminal liability, and should be excluded.

A retail druggist or apothecary holding a license of the sixth class under St. 1887, c. 431, who in good faith intends that sales shall not be made to minors, and instructs his clerks accordingly, and uses reasonable diligence in the selection of his clerks and in securing obedience to his instructions, is not criminally responsible for the act of a clerk in selling intoxicating liquor to a minor, whether such clerk makes an honest mistake or wilfully disobeys his employer's orders.

At the trial of an indictment charging the defendant, a retail apothecary, holding a license of the sixth class, under St. 1887, c. 431, with making unlawful sales of intoxicating liquor to a minor, the evidence tended to show that the minor was an express messenger; that he was accustomed to carry blanks torn from the certificate-book kept at the defendant's store to persons who would fill out and sign them, and give him money; that he would then carry the money and the signed certificates to the shop, receive liquor there, and take it to the purchasers; and that he had thus received it of the defendant personally and of his clerks. *Held*, that the delivery of intoxicating liquors to a minor, though acting as the agent of a disclosed principal, was forbidden by Pub. Sts. c. 100, § 9, cl. 4, and that the law in this respect was not changed by St. 1887, c. 431.

PETITION to establish the truth of exceptions alleged by Charles S. Joslin, who was found guilty upon certain counts in an indictment charging him with unlawfully exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same, and with unlawfully selling intoxicating liquors to minors. The exceptions sought to be established were disallowed by *Bond*, J., who presided at the trial in the Superior Court. Such facts as are material to the points decided upon the defendant's petition appear in the opinion.

The case was argued at the bar in October, 1892, and afterwards was submitted on the briefs to all the judges.

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J. Brown, (*R. C. Brown* with him,) for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

BARKER, J. The defendant was found guilty upon certain counts of the indictment, and seasonably filed a bill of exceptions, which was disallowed by the justice of the Superior Court in a certificate stating in detail the amendments which he considered necessary to make the bill conformable to the truth. The defendant then filed in this court a petition to establish the truth of the allegations in his bill of exceptions, and a commissioner was appointed whose report in favor of establishing the same came before the full court at the sitting in Bristol County in October, 1892. At the hearing before the commissioner the defendant's counsel assented to the corrections and additions suggested in the certificate disallowing the bill of exceptions; but the commissioner failed to incorporate them in the bill established by him, owing to a doubt whether it was competent and proper for him to add them to the bill. At the hearing before the full court, the right and duty of the commissioner to consider the certificate was argued, and the defendant's counsel consented that the corrections and alterations should be incorporated in the bill of exceptions to be established, rather than have the matter recommitted to the commissioner. The court took the matter under advisement, and, being of the opinion that it was the duty of the commissioner to consider the statements of the certificates disallowing the bill, ordered that the bill of exceptions, with the corrections and amendments agreed upon, be established, and that they stand for argument at the November sitting of the court for the Commonwealth in Boston. *So ordered.*

THE bill of exceptions as thus established, and afterwards argued on the merits, was in substance as follows.

The indictment contained seven counts. The first count charged that the defendant, on May 1, 1891, and from that day to November 1, 1891, "unlawfully did expose and keep for sale intoxicating liquors with intent unlawfully to sell the same," not "having then and there any license, authority, or appointment according to law therefor." Two counts charged

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him with unlawfully selling intoxicating liquors on two different dates, August 1, 1891, and September 1, 1891, to Edward C. Barney, a minor; and two other counts charged him with unlawfully selling intoxicating liquors on the same dates to Henry Bishop, also a minor. The defendant was a druggist in North Attleborough, holding a license of the sixth class under the St. of 1887, c. 431. At the beginning of the trial it appeared that the district attorney had requested the defendant, in writing, to produce the books which he was required by the statute to keep, containing the certificates signed by purchasers of intoxicating liquors. The defendant declined to produce them. Thereupon the district attorney called as a witness one Freeman, a constable, who testified that since May 12, 1891, and up to November, 1891, he had visited the defendant's drug store, and had been allowed by the defendant to copy from the book required by § 3 of said statute to be kept by the defendant under his license. A printed form of the certificates required to be kept by retail druggists under said § 3 was exhibited, and it was admitted that the certificates in the defendant's book were like the form exhibited, and were properly filled out and signed by the purchasers. The witness stated that he had taken the names of the purchasers, the kinds and quantities of liquors sold, and the dates of sales, and had copied them into a book, which he produced, in which he had written the name of each purchaser, the dates when his purchases were made, and the kind and quantity of liquor which he had purchased during the period referred to. The witness then testified from his copy, that he had not found in the defendant's book any record of sales to Edward C. Barney. Being interrogated in regard to sales to Henry Bishop, the witness read from his copy as follows: "August 29, half a pint of rum to Henry Bishop, for medicinal purposes; price 25 cents. Signed Henry Bishop in two places on the certificate." The witness said he found no other record of a sale to Henry Bishop. With reference to sales to one Charles Conaty the witness testified, reading from his copy, that the defendant's book showed that nine sales of half-pints of whiskey had been made from May 15 to May 29, on different days; that from June 1 to June 30 inclusive twenty-four sales of whiskey or rum had

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been made; that these were generally sales of half-pints, but that on three occasions a pint of rum had been sold; that the sales were all made on different days, except that on June 27 two sales, each of half a pint of rum, had been made to him; that from July 1 to July 31 inclusive twenty-one similar sales had been made, on different days; and that likewise fifteen sales had been made in the month of August, thirteen in September, and twenty in October; all being similar sales, and made on different days. The same witness further testified that Conaty lived in North Attleborough, and that his shop was in the same building with the defendant's; and that he was well acquainted with Conaty, and had seen him often between May and November. He was then asked, "Did you know of any sickness he had, or any in his family?" This question was admitted against the defendant's objection, and an exception was taken. The witness answered, "No, he appeared to be well, as far as I could see." The witness further testified, reading from his copy, that from May 12 to October 31 about the same number of sales, and in like quantities, on different days in each month, were made to John Carroll, to J. A. Welch, to Edwin L. Robinson, and to each of nine other persons. The witness having testified as to each of these persons, that he lived in North Attleborough, that the witness was acquainted with him, and had seen him frequently during the period covered by the sales, was asked as to each purchaser, "Did you know of any sickness he had, or any in his family?" to which question in every case he answered, "No, he appeared to be well, so far as I could see." And in every case the question was admitted against the defendant's objection, and an exception was taken.

The district attorney then called John Carroll, who admitted that the record of sales to him given in evidence by Freeman was substantially correct. He was then asked for what medicinal purposes he purchased the liquor. To this question the defendant objected, and it was admitted subject to exception. The witness answered, "I got it for chronic diarrhœa," and further testified that he was his own physician. Subject to like objection, Edwin L. Robinson testified that he did not pretend that he bought the liquor for medicinal purposes, though in

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each instance he signed the certificate stating that he bought it for medicinal purposes. Subject to like objection and exception, Charles Conaty testified that he did not purchase it for a beverage. "I have always drunk it for my stomach, for twelve years. I do not use it all myself; sometimes I treated the men in the shop." The district attorney then asked this question: "I see you purchased three quarts in four days. Did you purchase it for medicinal purposes?" The defendant objected to the question, and it was admitted subject to his exception. The witness answered, "I did what I used." He also testified, subject to the defendant's objection and exception, that he had no constitutional disease, and that he had not consulted a physician in twelve years. John A. Welch was asked the same questions, subject to the same objections and exceptions of the defendant, and testified: "I purchased it for sickness; I shall probably die of consumption; I purchased it to prevent consumption. I have never been advised to take it by a physician." On cross-examination he testified that consumption was hereditary in his family.

All the above mentioned purchasers admitted that the record testified to by Freeman was substantially correct. It also appeared, or was admitted by the Commonwealth, that the purchasers in each instance duly signed the certificate required by statute, filled out in due form.

The witness Freeman further testified, subject to the defendant's objection and exception, that in several instances the certificates had been torn out of the book and pasted in again; and that on these certificates the names of seven different persons appeared. The names of these persons, and the dates and amounts of their purchases, were stated by the witness. He also testified that they all lived in Plainville, a village about two miles from the defendant's store, and that the defendant had said that he knew about the certificates which they had signed, and that he considered that he had a right to have them torn from the book and signed away from the store.

Edward C. Barney testified that he was twenty years of age; that he lived in North Attleborough, and was the local agent of Earl and Prew's Express, who do a general express business in Boston, Providence, and elsewhere; and that he was their local

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agent, and also did business on his own account. He further testified that it had been his practice to take blank certificates, torn from the book, and carry them at different times to the persons named by Freeman; that these persons would fill out and sign the certificates, and give him the money for the liquor; and that he would carry the money and the certificates thus filled out and signed by the purchasers to the defendant's store, and receive the liquor there and carry it to the purchasers. The defendant admitted that he knew of the delivery to Barney, and that it was made with his knowledge and consent.

Henry Bishop testified that he would be seventeen years old in February, 1892; that he had purchased liquor at the defendant's store several times, and that he got it of the defendant personally a very few times, but could not tell how many. On cross-examination he said that he had not purchased it more than three or four times; that he got it of Hill or one of the other clerks, and once of the defendant; and that he told Hill he was twenty-one years of age. It was not contended by the defendant that Bishop was not a minor.

For the defendant, Hallock H. Hill testified that he had been employed as a clerk and general salesman by the defendant for several years prior to the trial; that the defendant had instructed him and the other clerks never to sell intoxicating liquors to minors, or to other persons to whom the statute prohibited sales to be made; and that he never knowingly did sell to a minor. He admitted that he had sold liquor to Henry Bishop. He was then asked, "What did Henry Bishop tell you as to his age, — whether he was an adult or a minor?" The question was objected to and excluded; and the defendant excepted.

Charles S. Joslin, the defendant, testified that he had, in good faith, instructed his clerks never to sell to minors, or other persons to whom sales were prohibited by statute, and that he never intended to sell to such persons.

The defendant requested the judge to instruct the jury as follows:

"1. The defendant had the lawful right, if he held a license of the sixth class as a druggist, to sell intoxicating liquors for medical, chemical, and mechanical purposes to all persons ex-

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cept such as the statutes prohibit him from making such sale to, provided the purchaser, an adult, signed the certificate prescribed by the statute, and it was filled out in due and legal form. 2. If such sales be frequent to any one person to whom sales could lawfully be made, who duly signed the certificate filled out as required by the statute on each occasion of his purchase, the defendant could not be held to be criminally liable for any one of the sales, any more than he would be if such sales were only occasional, with long intervals of time between the sales. If the government contends that any such sale to such frequent purchaser was illegal or a criminal act, the burden of proof is on it to show by proper and legitimate evidence which one or more was illegal or was a criminal act. Failing in this, it cannot, under the evidence, claim that the sales proved to have been made to adults were unlawful or criminal. 3. Independent of statute, selling intoxicating liquor is a lawful business. The statute nowhere limits or defines the number or frequency of the sales which such licensed druggist may lawfully make to any one adult person who at the time of each purchase signs the certificate, if it is filled out as prescribed by statute. 4. A sale to be illegal must be such as would support a count in the indictment charging an unlawful sale or criminal sale to such adult person. If no one sale to an adult is shown to be illegal, evidence of such frequent sales would not be evidence to support the first count in the indictment. Immoral or unwise acts do not necessarily become criminal acts until the law defines them as such. 5. Upon the evidence, the delivery of intoxicating liquors to Barney upon the signed certificates of the purchasers for whom he acted as agent of disclosed principals, who signed the certificates filled out as prescribed by statute, were not criminal sales to Barney by reason of Barney being a minor. 6. There is a distinction between deliveries upon signed certificates or prescriptions of a physician to minors, and ordinary delivery to minors under license to sell under the fourth class. 7. If the delivery of liquors to Edward C. Barney was made by the defendant's servants without his knowledge or consent, and against his instructions as to sales to minors, or if the jury have a reasonable doubt upon the question of such delivery by the defendant, or his

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knowledge thereof, he is entitled to an acquittal on the counts charging sales to said Barney. 8. Under his license the defendant had a right to keep and expose intoxicating liquors for sale, and unless the evidence shows the intent to sell to minors, or otherwise to make prohibited or unlawful sales, he cannot be convicted on the first count in the indictment."

The judge instructed the jury substantially as requested in the eighth prayer for instructions, but refused to give the other instructions requested by the defendant. A portion of the judge's instructions was as follows:

"It is not enough that the certificate is made out in proper form. Before he can justify that, it must be made to appear that the sales were made for medicinal purposes. In other words, the paper does not protect. It must appear on his part that it was for a medicinal purpose. If the defendant believed that it was for that purpose, he would not be liable. If he was deceived in that way, he would not be liable. But if a man came and by the circumstances the defendant knew or had reasonable cause to know that it was not wanted for that purpose, the certificate would not justify the sale. Where he knows or has reasonable cause to believe or know that it was not purchased for that purpose, the certificate would be no protection. When a man comes and says that he wants it for medicinal purposes, what does that mean? It is a sale made for the purpose of using the liquor as a medicine. When it is used as a medicine it is for some bodily or physical ailment. For that purpose it is right. If for social drinking, as one witness has testified, to treat his friends, or if used to produce intoxication, it is wrong. It is only when taken for some bodily ailment that it is for medicinal purposes. But where the sales were made when the defendant knew, or had reason to know, that they were not sold to be used for medicinal purposes, it is unlawful. The government relies upon the large number of sales to individuals. It is for you to say whether the defendant knew, or had reasonable cause to know, they were not for medicinal purposes. If not, the certificates would not protect him."

At the close of the charge the defendant called the attention of the court to the part of the charge above set forth, and excepted thereto.

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With reference to sales to minors, the judge instructed the jury "that if the defendant made a sale to a minor upon the representation of the minor that he was twenty-one years old, and believing that he was twenty-one years old, such sale would be a sale to a minor, and the defendant would be criminally liable for such sale; that if liquor was delivered to a minor by the defendant, or by his clerks with his knowledge or consent, for the use of an adult, the defendant could be convicted for such delivery under the count charging a sale to such minor, notwithstanding the fact that such liquor was for the use of an adult, and that fact was disclosed at the time of such delivery, and notwithstanding such adult had signed a certificate for such liquor, which had been torn out of the defendant's book, and taken to such adult and signed and returned by the minor and pasted in the defendant's book at the time of such delivery; that if the sale or delivery to the minor was made by a clerk in the employ of the defendant, contrary to the instructions of the defendant to such clerk, given in good faith by the defendant, and such sale and delivery were without the knowledge or consent of the defendant, the defendant would not be criminally liable for such sale or delivery, and therefore it is necessary for the jury to determine in this case whether the defendant or his clerks made the sales as charged in said count for sales to minors, and whether, if made by the clerks, they were made with the defendant's knowledge and consent."

The jury returned a verdict of guilty on the first count of the indictment, and on each of the four counts charging sales to the minors Barney and Bishop; and the defendant alleged exceptions.

J. Brown, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth, did not care to be heard.

BARKER, J. The defendant contends that a license of the sixth class gives to a druggist who complies with the requirements as to the time, place, and manner of making sales the right to sell in all cases, save to prohibited persons, although he may know that the liquors are in fact bought for a purpose for which he has no license to sell, and although they are delivered to a minor. But it is plainly the intention of the statutes, (Pub. Sts. c. 100, §§ 1, 2, 9, 10, 18, St. 1887, c. 431,) that sales of intoxi-

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cating liquors by retail druggists and apothecaries shall be made only for medicinal, mechanical, or chemical purposes, and a construction which should legalize sales made by them of liquors which they know or believe are to be used as a beverage, and which are bought for that purpose, could be reached only by disregarding the evident purpose of the Legislature. To prevent sales under the false pretence of use for medicinal, mechanical, or chemical purposes, the St. of 1887, c. 431, prohibits to these dealers any license except one of the sixth class, requires a certificate of the purchaser stating the use for which the liquor is wanted, the keeping of a book containing the particulars of each sale, and the cancellation and preservation of all certificates and prescriptions, and also imposes a penalty for making a false and fraudulent certificate or prescription. If this relieved the druggist from responsibility for selling in bad faith, knowing or believing that the certificate or prescription was false and fraudulent, and that the liquors were to be used as a beverage, it would sanction subterfuges which would go far to render all restrictive legislation futile. To show that such was not the intention of the Legislature, it is not necessary to read anything into the statutes, or to construe them otherwise than with strictness. Taken together, they authorize retail druggists and apothecaries to sell intoxicating liquors only when they are to be used for medicinal, mechanical, or chemical purposes; and not to sell them whenever a purchaser makes the statute certificate. The provision that "Sales of intoxicating liquor of any kind by retail druggists and apothecaries, for medicinal, mechanical, or chemical purposes, shall be made only upon the certificate of the purchaser," (St. 1887, c. 431, § 2,) is to be read with the general prohibition, "No person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized," (Pub. Sts. c. 100, § 1,) which forbids all sales of such liquors without due authority. *Commonwealth* v. *Ramsdell*, 130 Mass. 68. And retail druggists and apothecaries cannot be licensed to sell them for a beverage. Even if the general doctrine which governs such sales, that guilty knowledge is not essential to the offence, (*Commonwealth* v. *Julius*, 143 Mass. 132, and cases cited,) is not to be applied, their sales made in bad faith for an unauthorized purpose are illegal.

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But unless one licensed to sell for an authorized purpose, and who honestly intends to comply with the law, sells at his peril, if the purchaser buys for a purpose not authorized, the charge of making an illegal sale necessarily includes the charge that the vendor believed that the sale was for a purpose not authorized, and his belief is therefore material. So also is the intention of the purchaser; because if he buys for an authorized purpose, although the vendor intends to break the law, there is no crime. Hence the requests based upon the theory that the intention, knowledge, or means of knowledge of the vendor as to the real purpose of the transactions between him and the purchasers were immaterial, were incorrect in law and rightly refused; and the evidence objected to was all relevant either to the belief of the vendor or to the purpose of the purchasers, and was rightly admitted. This would dispose of the exceptions, so far as they relate to the count for illegal keeping, if the instructions given had contained no error.

The sales to other than prohibited persons were not illegal, if in making them the defendant complied with the statute requirements and acted in good faith, honestly intending to keep within the authority given him by the law, and he could not do this unless he believed the liquors were wanted for an authorized purpose. What in the discussion of propositions of criminal law is often called the intention, is an element in the decision of this question, which is one of fact, and in dealing with it the distinction between belief or knowledge and reasonable cause to know becomes important. Neither knowledge, belief, nor intention can, in the nature of things, be proved except by inference. Reasonable cause to know is not an equivalent to knowledge. *Lindsey* v. *Stone*, 123 Mass. 332. *Carroll* v. *Hayward*, 124 Mass. 120, and cases cited. It raises a strong inference of knowledge or of belief; but it is nevertheless consistent with the absence of belief as well as of knowledge, and even with the existence of a belief contrary to the real fact; and this, too, on the part of one who has a duty to know. The mind may be preoccupied or slow, and the thought necessary to produce comprehension dormant. The inference from proof of a single circumstance which would be reasonable cause to know must be weaker than that to be drawn when the mind is shown

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to have frequent occasion to consider similar facts. Not only are knowledge and reasonable cause to know, and all circumstances tending to prove either, relevant to the question of belief in such a case as the present, but reckless or negligent conduct in the transaction may be shown. If one is shown to have long had reasonable cause to know, and frequent occasion to consider, the circumstances which constitute such reasonable cause, the inference of belief becomes almost imperative; and yet it is an inference of fact, and not of law, and is for the jury. In the present case the frequency of the defendant's sales during a long period to persons whose appearance and condition might indicate that they bought the liquors for a beverage was an important fact, and may well be characterized as giving him reasonable cause to know the real purpose of the purchasers. But the jury are to be allowed to make or to decline to make the inference. The charge should have explained the distinction between that knowledge or belief on the part of the defendant, proof of which would have required the jury to find him guilty of sales made in bad faith and with the belief that they were not for authorized purposes, and that reasonable cause to know which might be consistent with his innocence. This was not done, but the jury were instructed that, if the defendant either knew or had reasonable cause to know that the liquors were not wanted for the purposes stated in the certificate, the sale would be illegal. It is true that they were also told that if he believed that a sale was for an authorized purpose he would not be guilty, and also that if he was deceived as to the purpose he would not be guilty. These last instructions, so far as they went, were correct, and if they stood alone would perhaps have been sufficient. But the statement that the defendant was to be convicted if he knew or had reasonable cause to know that the sales were for purposes not authorized, was so often repeated that the jury may have been misled. On this point the exception to the charge must be sustained, and this requires us to set aside the verdict upon the first count.

The counts for sales to minors depend on different considerations, and the error above pointed out had no tendency to affect the action of the jury upon them. One condition of the defendant's license was, that no sale or delivery should be made

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to a minor "either for his own use, the use of his parent, or of any other person." Pub. Sts. c. 100, § 9, cl. 4. The condition annexed by clause 2 of § 9 to licenses of the sixth class is the only one from which retail druggists and apothecaries are exempted by the St. of 1887, c. 431; and this exemption itself implies that they are subject to the other conditions imposed by the earlier statutes. In *Commonwealth* v. *Stevens*, 153 Mass. 421, the defendant held such a license; and it was said that, his servant was no doubt responsible, because he had made a sale, however innocently, which the law forbade him to make, and that the defendant would have been responsible for his own mistake if the sale to the minor had been made by him. Since the passage of the St. of 1887, c. 431, as before, a retail druggist or apothecary holding a license of the sixth class is bound at his own peril to keep within the condition imposed by the Pub. Sts. c. 100, § 9, cl. 4; and may be convicted of an illegal sale if he personally deliver intoxicating liquors to a minor, or if such a delivery is made with his knowledge or consent; although if he in good faith intend that sales shall not be made to minors, and instruct his clerks accordingly, intending that his instructions shall be followed in good faith, and use reasonable diligence in the selection of his clerks, and in his regulations and precautions to secure obedience to his instructions, he is not to be held criminally responsible for the act of a clerk in selling to a minor, whether such clerk made an honest mistake as to the minor's age, or acted wilfully in defiance of the instructions of his employer. See *Commonwealth* v. *Stevens*, *ubi supra*.

These principles were substantially embodied in the charge to the jury; but the defendant contends that Hill, the clerk, who testified that he had made sales to Henry Bishop, should have been allowed to testify as to what Bishop told him as to his age. But evidence of Hill's good faith in making sales to Bishop was immaterial to the question whether the defendant was criminally responsible for such sales, and was properly excluded.

The verdicts of guilty upon the second and third counts, charging illegal sales to Barney, are attacked upon a different footing. The evidence tended to show that Barney was an express messenger, and not of full age; that he was accustomed

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to carry blanks torn from the certificate book kept at the defendant's store to persons who would fill out and sign them, and give him money; that he would then carry the money and the signed certificates to the store, and receive liquor there, and take it to the purchasers; and that he had thus received it of the defendant personally, as well as of his clerks. There was no evidence that the defendant, or his clerks, supposed Barney to be of full age; but the defendant contended that deliveries to Barney, as the agent of disclosed principals upon such certificates, were not illegal sales to Barney. It is, however, well settled that a delivery of intoxicating liquors to a minor, acting as the agent of a disclosed adult principal, was forbidden by the St. of 1880, c. 239, § 3, and by the Pub. Sts. c. 100, § 9, cl. 4, (*Commonwealth* v. *O'Leary*, 143 Mass. 95, and *O'Connell* v. *O'Leary*, 145 Mass. 311, 313,) and we are of opinion that no change in this respect was made by the St. of 1887, c. 431. The fifth and sixth instructions requested by the defendant were erroneous, and rightly refused. The instructions given covered the matters mentioned in the seventh request, and gave the jury correct and sufficient instruction as to the law applicable to the counts for sales to minors. The exceptions relating to these counts cannot, therefore, be sustained, and the verdicts upon them are to stand. *Verdict upon the first count only set aside.*

KNOWLTON, J. I do not agree with the majority of the court in holding that a sale of intoxicating liquors by a licensed apothecary with a purpose to have it used as a beverage is lawful, if the purchaser deceiving him actually intends to use it as a medicine, and that a sale is brought within the protection of the license if either the buyer or the seller, no matter which, has a purpose to have the liquor used as a medicine.

The act of selling intoxicating liquor without a license is not *malum in se*, but *malum prohibitum*. In prosecutions under statutes regulating the sale of intoxicating liquors, as well as statutes prohibiting the sale of impure milk, it has been held for many years that the law punishes the act without looking for any criminal intent beyond the intentional doing of the thing forbidden. It has been thought that the only practicable way of accomplishing the purpose of the Legislature is to require

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the seller to find out for himself whether his act is within the prohibition. So, if one intentionally sells a liquid which is in fact intoxicating liquor, although he believes it to be non-intoxicating, he is punishable. *Commonwealth* v. *Boynton*, 2 Allen, 160. *Commonwealth* v. *Goodman*, 97 Mass. 117. *Commonwealth* v. *Hallett*, 103 Mass. 452. *Commonwealth* v. *Savery*, 145 Mass. 212. *Commonwealth* v. *Daly*, 148 Mass. 428. If he sells to a minor, he is guilty, notwithstanding that he believes the purchaser to be of full age. "One holding a license must, at at his peril, keep within the terms of it." *Commonwealth* v. *Barnes*, 138 Mass. 511, 512. *Commonwealth* v. *Farren*, 9 Allen, 489. *Commonwealth* v. *Emmons*, 98 Mass. 6. *Roberge* v. *Burnham*, 124 Mass. 277. *Commonwealth* v. *Finnegan*, 124 Mass. 324. *Commonwealth* v. *Uhrig*, 138 Mass. 492. *Commonwealth* v. *Julius*, 143 Mass. 132. The decisions under the statute have been uniform in this particular, and there is no reason for giving it a different construction in the present case.

The act prohibited is the sale of intoxicating liquor in any way not expressly authorized. The act permitted to an apothecary under his license is a sale "for medicinal, mechanical, or chemical purposes." Pub. Sts. c. 100, § 2. A sale of liquor for a medicinal purpose is a sale with an intention that it shall be put to a medicinal use. The use to which it is in fact put after it has been sold is immaterial. The act is complete as soon as the sale is made, its character is permanently fixed, and the sale then is or is not a sale for a medicinal purpose. When the sale is made, the kind of use to which the liquor is to be put is in the future, and whether it is medicinal or otherwise is necessarily a matter merely of expectation and intention. If we contemplate a sale as made for a purpose in regard to the use to which the liquor is to be put, the purpose is to be determined, not by the use to which it afterwards happens to be put, but by that to which the seller intends that it shall be put. The sale licensed is a sale for a specified purpose; that is, a sale with a view to the appropriation of the liquor to that purpose or expected use. The liquor may or may not afterwards be used as expected. A sale which is not made for such a purpose and with such a view is unlawful. The characterization which distinguishes the act as lawful or unlawful pertains to the sale, not to the purchase.

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Note the expressions repeated in different clauses of the statutes: "May sell pure alcohol for medicinal, mechanical, or chemical purposes." "The purpose for which it was sold." Pub. Sts. c. 100, §§ 2, 3; St. 1887, c. 431, §§ 2, 3. The intention or purpose referred to is that of the seller, not that of the buyer. It is the seller whose act is lawful or unlawful, because it is or is not done for an approved purpose, — that is, with an approved intention in regard to the use to be made of the liquor in the future.

It is true that his purpose relates to that which he expects will be done by the buyer. But the law prescribes elaborate requirements, which are intended to inform him what use the buyer expects to make of the liquor, so that he will not be likely to sell it for a medicinal purpose unless the buyer buys it for the same purpose. But if the intentions of the two parties to the sale are different, the statute looks to the intention of the seller. The vendor and vendee stand in different relations to a sale, and the purpose or intention of one in reference to the use to be made of an article sold may differ from that of the other. The statute deals with a single purpose, not with two different purposes.

As I understand it, the case stands thus. An apothecary sells intoxicating liquor. He is to be punished if the sale is not permitted by his license. It is not permitted by his license unless it is a sale for a medicinal purpose; that is, a sale with a view to have the liquor used as a medicine. It either is or is not a sale for a medicinal purpose as soon as it is made. In a supposable case, the parties to the transaction, through the deception of one of them, entertain different purposes in regard to the use to be made of the liquor. The test of legality established by the statute is a purpose or intention in regard to that. It cannot be two different purposes which are not in harmony. If it is the purpose of the seller, and if his purpose is that the liquor shall be used as a medicine, and if the forms of law are complied with, it makes no difference whether the purchaser afterwards uses it as a medicine or as a beverage, and it is of no consequence what the secret intention of the purchaser is in regard to it. On the other hand, if it is the purpose of the buyer, and the buyer intends to use it as a bev-

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erage, it makes no difference that the purpose of the seller is that it shall be used as a medicine. His license protects him only when the purpose or intention referred to in the statute is that the use shall be medicinal, mechanical, or chemical.

It seems to me that the doctrine of the opinion requires us to hold that the sale is for a medicinal purpose, and the act of selling is within the protection of the license, if either the buyer or the seller intends that the use of the liquor shall be medicinal, although the other entertains an opposite purpose, so that the purpose referred to by the statute in any case may be that either of the buyer or of the seller, with nothing to show which, or else requires us to overrule the construction which has been put upon the statute in many cases, by which it is settled that a defendant is punishable if he does the prohibited act, and that guilty knowledge is not necessary to his conviction.

COMMONWEALTH *vs.* FRANK H. GOULD.

Bristol. October 24, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Name of Indicted Person — Variance — Intoxicating Liquors — Evidence — License — Physician's Certificate — Guilty Knowledge or Belief — Reasonable Cause to know.

An indictment alleged a sale of intoxicating liquor to one Henry Bishop, whose name appeared at the trial to be Henri Leveque, but he himself testified that he was commonly known by the other name. *Held*, that the question of variance was one of fact for the jury.

At the trial of an indictment against a retail druggist holding a license of the sixth class under St. 1887, c. 431, for selling intoxicating liquor to a minor, the defendant offered evidence to show that the minor bought the liquor for his mother, who was sick. *Held*, that, as the sale was illegal whether made to the minor as a principal or as an agent, the evidence was rightly excluded.

A retail druggist, who holds a license of the sixth class under St. 1887, c. 431, is bound at his peril to keep within the condition of his license that no sale or delivery shall be made to a minor "either for his own use, the use of his parent, or of any other person," (Pub. Sts. c. 100, § 9, cl. 4,) and such a sale or delivery is

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illegal even if the purchaser had the appearance of being of full age and even though the sales were made to him in the honest belief that he was an adult.

The certificate of a purchaser of intoxicating liquor given, in due form, to a retail druggist who holds a license of the sixth class under St. 1887, c. 431, stating that the liquor is wanted for medicinal purposes, even though the certificate is accompanied by the prescription of a physician which calls for the liquor, does not legalize the sale if the liquor is really bought to be used as a beverage and is sold by the druggist with the knowledge or belief that it is bought for that purpose.

If a sale of intoxicating liquor is made by a retail druggist who holds a license of the sixth class under St. 1887, c. 431, upon a certificate, in due form, stating that the liquor is wanted for an authorized purpose, and if the purchaser in fact wants it for that purpose the sale is lawful even though the druggist sells with guilty intent, believing that the liquor is wanted for an unauthorized purpose.

In order to prove that a retail druggist holding a license of the sixth class under St. 1887, c. 431, has made an illegal sale of intoxicating liquor, the government must prove, not only that the liquor was really bought for an unauthorized purpose, but also that it was sold by the druggist with guilty knowledge or belief.

At the trial of an indictment against a retail druggist, holding a license of the sixth class under St. 1887, c. 431, for the illegal exposing and keeping for sale of intoxicating liquors, the government relied upon evidence of illegal sales, and proved that numerous sales of small quantities of liquor had been made to various persons upon certificates stating that they wanted the liquor for medicinal purposes. Some of these purchasers were then permitted to testify, for the government, as to the real purpose for which they had bought the liquor, their evidence having a tendency to show that they really wanted it for a beverage, and that their certificates were false and fraudulent. *Held*, that, although the witnesses might have declined to answer the questions on the ground that their answers might tend to criminate themselves, the defendant could not avail himself of this objection. *Held, also*, that the evidence was competent to show that the liquor was in fact wanted for an unlawful purpose, and rightly admitted. *Held, also*, for the same reason, that the testimony of witnesses, who had bought at the defendant's store pints or half-pints of whiskey or rum, ostensibly for medicinal purposes, from ten to eighteen times during each of the six months covered by the indictment, that during the same period they had bought elsewhere an equal amount of liquor in similar quantities, was rightly admitted, although it did not appear that the defendant had any knowledge of purchases made elsewhere. *Held, also*, that the evidence of a witness for the government who was acquainted with these purchasers, and had seen each frequently during the period covered by the alleged illegal sales, that throughout that period they all appeared to be in good health, was competent either to show that the liquor was in fact wanted for an unlawful purpose, or to show guilty knowledge or belief on the part of the defendant, and was rightly admitted.

"Reasonable cause to know" is not equivalent to belief or knowledge; and when the government undertakes to prove that a retail druggist, holding a license of the sixth class under St. 1887, c. 431, has made illegal sales of intoxicating liquors, it is not enough for the government to prove that the defendant sold the same having reasonable cause to know or believe that they were bought for unauthorized purposes, but it must prove that the defendant made the sales actually knowing or believing that such was the fact.

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INDICTMENT charging the defendant in the first count with unlawfully exposing and keeping for sale intoxicating liquors from May 1, 1891, to the first Monday of November, 1891, and in the sixth and seventh counts with unlawfully selling intoxicating liquors to one Henry Bishop, a minor. Trial in the Superior Court before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

The defendant was a retail druggist and apothecary, carrying on business in North Attleborough. A license of the sixth class had been granted to him on May 1, by the selectmen of the town, as provided in St. 1887, c. 431, § 1. All his books kept as required by said statute, § 8, were produced at the trial, and were offered in evidence by the prosecuting officer, and a portion of them were read to the jury. It appeared therefrom that quite a large number of sales had been made each month, mostly in small quantities, and that certain persons named had purchased very frequently whiskey and rum, usually about half a pint, during each month. The certificates for the first ten days of October were read to the jury by the district attorney. The sales for the first nine week days were as follows: October 1st, 87; 2d, 58; 3d, 117; 4th, Sunday; 5th, 79; 6th, 85; 7th, 50; 8th, 64; 9th, 60; 10th, 103. All these but one were certified to be for medicinal purposes, and all but about thirty were small quantities of rum and whiskey, usually a pint or a half-pint; and all but sixty-three were to persons who certified their residence as North Attleborough. It further appeared from the certificates that there were over twenty-two hundred sales in October. Certificates of sales to fifteen persons were also read to the jury, from which it appeared that these persons had bought liquor from ten to eighteen times during each of the six months covered by the indictment, and that most of these purchases were pints or half-pints of whiskey and rum. Some of these persons were called as witnesses, as hereinafter stated. Evidence was also offered tending to show that North Attleborough was a town of about 8,000 inhabitants. All the sales made by the defendant were made by him upon the certificate of the purchaser, signed by him, and stating the purposes for which the liquors were wanted, as provided in the statute. It was not contended, nor was any evidence offe ed to show, that the defendant had made any sale

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of any kind of liquors except upon such certificate; and it appeared by the certificates put in evidence that the liquors were in all cases wanted for medicinal, mechanical, or chemical purposes, mostly medicinal.

One Freeman, a constable living in North Attleborough, called as a witness by the government, was inquired of as to the fifteen persons whose certificates were put in evidence, as hereinbefore stated, and he testified that he was acquainted with them and saw them frequently from June to November, and that they lived in North Attleborough; and he was then allowed to state, against the defendant's objection, that they appeared to be in good health during the time from June till November. Several of the persons who had purchased most frequently of the defendant were called as witnesses by the government, and were asked by the district attorney for what purpose they purchased the liquors. To this question the defendant objected, but the court overruled the objection.

Certificates having been put in evidence from which it appeared that Thomas Saul had purchased small quantities of rum and whiskey, in June, 22 times, in July, 23 times, in August, 14 times, in September, 15 times, and in October, 18 times, he was called as a witness and testified substantially as follows: "I am acquainted with the defendant. I have always lived in North Attleborough. My business is the driving of a butcher cart. I am compelled to work sometimes sixteen hours a day, and to lift sides of beef weighing two hundred and fifty pounds. I am troubled with malaria and I bought the liquor certified to and used it to keep off malaria. I have not consulted a physician for the malaria for many years. I have lost no time from my work, and have worked steadily during the whole of the six months from May 1 to November 1. I took the liquor because I thought it did me good and kept off the malaria. I also bought liquor regularly at another place during this time, probably nearly as much as I bought at Gould's. This I used for the same purpose. I have lived in North Attleborough for a number of years."

Certificates having been put in evidence to show that John Carroll had bought liquor on an average of twelve times per month from June 1 to November 1, he was called as a wit-

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ness and testified substantially as follows: "I am acquainted with the defendant. My business is that of a jeweller. I live in North Attleborough, and have for many years. Was once in the army. I bought the liquor referred to in the certificates for medicinal purposes. My disease was the chronic diarrhœa. I have had the disease since 1864, and I think the liquor does it good. I have not consulted a physician, and no physician has prescribed liquor for my disease. I work at my business the larger portion of the time, but have to lay off a portion of the time each month on account of my disease. I also bought about the same quantity of liquor during this time of another person for the same purpose."

Certificates having been put in evidence from which it appeared that Charles Conaty had purchased liquor frequently, sometimes rum and sometimes whiskey, from half a pint to a pint at a time, and that these purchases were made on an average of more than ten times a month from June 1 to November 1, he was called as a witness and testified substantially as follows: "My business is that of a barber. Shop on the same street with Gould's apothecary store. I am acquainted with the defendant. Have lived in North Attleborough a number of years. The liquor I bought was for medicinal purposes, some for myself and some to give to others. My disease is dyspepsia, and the purpose for which I bought the liquor and used it was for the dyspepsia. I have had stomach trouble for eleven years. Have not consulted a physician in regard to it, but believe the liquor is good for the dyspepsia. Have worked at my trade steadily, and did not lose any time from May 1 to November 1. Also bought liquor in about the same quantities at another store during the same time. This was also for the same purpose."

Certificates having been put in evidence showing that Stephen McLaughlin during the months of June, July, and August had purchased liquor of the defendant fifty-four times, one purchase being of gin, seven of whiskey, one of six bottles of ale, and all the rest of rum in small quantities not exceeding a pint, he was called as a witness and testified substantially as follows: "My business is keeper of a saloon and pool table. The liquor I purchased at Gould's was for medicinal purposes. I took it for a disease that I had which the doctor called malaria, I believe.

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Consulted a physician either the 30th of April or 1st of May, and was advised to take whiskey for the malaria. Bought rum mostly instead of whiskey because I thought it would make no difference. Up to April 30 there had been licensed places for the sale of liquor in North Attleborough. Since then there have been none excepting the apothecary stores. Have also purchased liquor during the same time of another apothecary store for the same purpose."

The district attorney was allowed, without objection, to cross-examine each of the above witnesses, and put leading questions to them, and in his argument to the jury he commented both upon their physical appearance and upon their appearance as witnesses, and the manner in which they answered the questions put to them.

So much of the foregoing testimony from each witness as related to purchases by him of liquor from any other place during the time covered by this complaint was admitted, against the objection of the defendant. It did not appear, and was not contended by the district attorney, that the defendant had any knowledge of these other purchases in any of the cases.

It was contended by the district attorney, in the argument to the jury, that the uses stated by the witnesses in the said certificates, and also in their testimony, were a mere pretence, and that the liquors were in fact purchased to be used as a beverage.

The government called Henry Bishop as a witness. He testified that he was sixteen, and would be seventeen next February. It appeared by the defendant's books, and he testified, that on September 9 and 10 he purchased half a pint of whiskey, and on September 30 half a pint of rum, upon a certificate signed by him that the liquors were wanted for medicinal purposes. These purchases were from the defendant personally. Upon cross-examination he stated that he was a Frenchman; that his true name was Henri Leveque, and he was allowed to state, against the defendant's objection, that he was commonly known by the name of Henry Bishop. No other evidence was offered that he was commonly known by the name of Henry Bishop. He also testified that the defendant asked him how old he was when he procured the liquors, and that he told him he was twenty-one.

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He also testified that his mother sent him for it, and was asked by the defendant's counsel whether his mother was sick, whether she sent the money to pay for it, whether he so informed Mr. Gould, or whether he said anything to him about the matter. To all of these questions the district attorney objected, and they were excluded.

The defendant requested the judge to instruct the jury as follows:

"1. If the defendant has not sold any intoxicating liquor of any kind to any person, except upon the certificate of such purchaser, stating that the same was to be used for medicinal, mechanical, or chemical purposes, or upon the prescription of a physician, as provided in St. 1887, c. 431, he cannot be convicted upon the first count in the indictment. 2. The defendant cannot be convicted on either count in the indictment for making a sale of any kind of intoxicating liquors to any adult person, if such sale was made upon the certificate of the purchaser stating that it was wanted for medicinal, mechanical, or chemical purposes, or upon the prescription of a physician, as provided in St. 1887, c. 431. 3. The defendant cannot be convicted upon either count in the indictment for making a sale of any kind of intoxicating liquor to any adult person, if such sale was made in good faith, upon the certificate of the purchaser stating that such liquor was wanted for medicinal, mechanical, or chemical purposes, or upon the prescription of a physician, as provided in St. 1887, c. 431. 4. If the person called Henry Bishop in the indictment had the appearance of being of full age, and if the sales were made to him in good faith, after due caution and in the honest belief that he was an adult, the defendant cannot be convicted on the counts for sales to him, if the sales were made in the manner provided in St. 1887, c. 431. 5. If the defendant inquired of the so called Henry Bishop as to his age, and was informed by him that he was twenty-one, and the sales were made to him in the manner provided in St. 1887, c. 431, after due caution and in the honest belief that he was an adult, the defendant cannot be convicted on the counts for sales to him. 6. The defendant cannot be convicted for a sale of any kind of intoxicating liquor to the so called Henry Bishop for medicinal, mechanical, or chemical

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purposes, whether said Bishop was a minor or not, upon his certificate made as provided in St. 1887, c. 431, on the counts in the indictment for sales to him. 7. The defendant cannot be convicted upon the first count in the indictment for a sale of any kind of intoxicating liquor to any minor for medicinal, mechanical, or chemical purposes, made upon his certificate, or the prescription of a physician, as provided in St. 1887, c. 431. 8. If the true name of the person called Henry Bishop in the indictment, and to whom the sales were made, was Henri Leveque, and not Henry Bishop, it is a fatal variance, and the defendant cannot be convicted on those counts for a sale to him. 9. If the sale of intoxicating liquors to adults was made by the defendant upon certificates or prescriptions as provided in St. 1887, c. 431, in the honest belief that the same were wanted for medicinal, mechanical, or chemical purposes, it is immaterial whether the same were actually used or wanted for any such purpose or not, and the defendant cannot be convicted on the first count in the indictment. 10. If the defendant made the sales to the so called Henry Bishop, as alleged in the indictment, upon his certificate as provided in St. 1887, c. 431, in the honest belief that he was an adult, he cannot be convicted upon the first count in the indictment. 11. The whole evidence in the case is not sufficient to warrant the jury in convicting the defendant upon any count in the indictment."

Full instructions were given as to what was necessary for the government to prove to constitute the offence set out in the first count of the indictment. With reference to the evidence of illegal sales of intoxicating liquor, the judge instructed the jury that sales knowingly made by the plaintiff in violation of law were evidence of an illegal keeping of liquor with intent to sell in violation of law; that if the defendant kept liquor not intending to sell the same illegally, and in making sales believed that the sales made to adults were for the purposes specified in their certificates, or in case of sales made to minors believed that the persons to whom the sales were made were adults, such sales would not be evidence of any intent to sell in violation of law, even though the liquor purchased by the adults was not wanted for the purpose specified in the certificates signed by them, and although the persons who purchased were in fact

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minors, and that such sales were not evidence showing any keeping of intoxicating liquor with intent to sell the same in violation of law. Full instructions were given upon all parts of the case not excepted to.

The judge instructed the jury that, if the defendant sold intoxicating liquor to persons, knowing, or having reasonable cause to know, that such liquor was not purchased for either medicinal, mechanical, or chemical purposes, such sales would be illegal, notwithstanding the purchasers signed a certificate that such liquor was purchased for medicinal, mechanical, or chemical purposes.

The judge instructed the jury as requested in the third and ninth of the defendant's prayers for instructions, but refused to give the other instructions prayed for. The jury returned a verdict of guilty on each of the three counts on which the defendant was tried; and the defendant alleged exceptions.

The case was argued at the bar in October, 1892, and afterwards was submitted on the briefs to all the judges.

H. J. Fuller, for the defendant.

C. N. Harris, Second Assistant Attorney General, for the Commonwealth.

BARKER, J. 1. Evidence that the person named in the indictment as Henry Bishop was commonly known by that name was competent upon the question of variance, which was one of fact for the jury. *Commonwealth* v. *Gormley*, 133 Mass. 580, and cases cited. *Commonwealth* v. *Caponi*, 155 Mass. 534.

2. As the sale of intoxicating liquors to a minor is illegal, whether made to him as a principal or as an agent, evidence that the purchase was for his mother who was sick, was immaterial, and was rightly excluded. *Commonwealth* v. *O'Leary*, 143 Mass. 95. *O'Connell* v. *O'Leary*, 145 Mass. 311, 313. *Commonwealth* v. *Joslin*, *ante*, 482.

3. Instructions that the defendant could not be convicted of illegal sales to Bishop if he had the appearance of being of full age, and if the sales to him were made in good faith, in the honest belief that he was an adult, were rightly refused. Knowledge that the purchaser was a minor was not essential to the offence. The defendant was bound at his own peril to keep within the condition of his license, that no sale or delivery

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should be made to a minor, "either for his own use, the use of his parent, or of any other person." Pub. Sts. c. 100, § 9, cl. 4. *Commonwealth* v. *Hallett*, 103 Mass. 452. *Commonwealth* v. *Barnes*, 138 Mass. 511. *Commonwealth* v. *Julius*, 143 Mass. 132. *Commonwealth* v. *Savery*, 145 Mass. 212. *Commonwealth* v. *Daly*, 148 Mass. 428.

4. It is the intention of the statutes that sales of intoxicating liquors shall be made by retail druggists and apothecaries only for medicinal, mechanical, or chemical purposes. Pub. Sts. c. 100, §§ 1, 2, 9, 10, 18. St. 1887, c. 431. *Commonwealth* v. *Joslin*, *ante*, 482. Sales of liquors to be used as a beverage made by them with the knowledge or belief that the liquors are to be so used are illegal, and the rulings that the certificate or prescription in every case legalized the sale were rightly refused.

5. As such illegal sales, if made in good faith, without knowledge or belief that the liquors were in fact intended to be used as a beverage, are consistent with the absence of any intention on the part of the seller to violate the law; and as in the opinion of the majority of the court there is no crime if the liquors are in fact bought for an authorized purpose, although the seller believes that they are to be used as a beverage, the government to sustain the charge made in the first count must, in the opinion of the majority of the court, prove both that the sales were illegal and made with guilty knowledge or belief. The evidence admitted under the defendant's objection was competent for one or both of these purposes. See *Commonwealth* v. *Joslin*.

6. The testimony of such of the purchasers as were asked by the government for what purpose their purchases were made was in the opinion of a majority of the court competent. If they had made false and fraudulent certificates, the government was not responsible for them, and could show their falsity. The witnesses themselves did not decline to answer the questions, and could do so only on the ground that their answers might tend to criminate themselves. The objection on that ground could not avail the defendant, and was not in fact taken by him at the trial.

7. The instruction "that if the defendant sold intoxicating liquor to persons knowing, or having reasonable cause to know, that such liquor was not purchased for either medicinal, mechan-

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ical, or chemical purposes, such sales would be illegal," is erroneous, and was so held in *Commonwealth* v. *Joslin*, for the reason that reasonable cause to know is not equivalent to belief or knowledge. In the present case the instruction is to be read in connection with the third and ninth prayers, which were given as requested, and with the other instructions given. These were to the effect that, while sales knowingly made in violation of law were evidence of an illegal keeping, if the defendant kept liquor not intending to sell it illegally and in making sales believed them legal such sales would not be evidence of an intent to sell in violation of law, nor of a keeping with intent to sell in violation of law. But, upon the whole, we are of opinion that the erroneous ruling may have misled the jury upon the count for illegal keeping, and that the verdict upon that count ought for this reason only to be set aside.

We find no error affecting the verdicts of guilty upon the sixth and seventh counts for sales to Henry Bishop, and the verdicts upon these counts are to stand.

Verdict of guilty upon the first count set aside.
Verdicts on the sixth and seventh counts to stand.

PROPRIETORS OF MOUNT HOPE CEMETERY *vs.* CITY OF BOSTON & others.

Suffolk. November 23, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mandamus — Statute — Constitutional Law — Obligations of City or Town — Police Power — Private Corporation.

The St. of 1889, c. 265, requiring the city of Boston, without compensation, to transfer the Mount Hope Cemetery to the corporation called "The Proprietors of Mount Hope Cemetery," is unconstitutional. The cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and its ownership is protected under the Constitution of Massachusetts, Art. X. of the Declaration of Rights, and the Constitution of the United States, Fourteenth Amendment, so that the Legislature has no power to require its transfer without compensation.

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The Legislature cannot require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it.

The legislative power over municipal property, when it exists, does not extend so far as to enable the Legislature to require a transfer, without compensation, to a private person or private corporation.

A corporation does not become a public one merely by receiving a charter from the Legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation.

The corporation known as the Proprietors of Mount Hope Cemetery, incorporated under St. 1889, c. 265, falls within the class of private corporations.

PETITION for a writ of mandamus to compel the city of Boston and its mayor to convey Mount Hope Cemetery to the petitioners, in accordance with St. 1889, c. 265.* Upon motion,

* This statute is entitled "An act to provide for the transfer and management of Mount Hope Cemetery in the city of Boston."

The first three sections created the corporation and provided for its organization. The fourth and fifth sections are as follows:

"Sect. 4. Immediately upon the organization of said corporation said city of Boston shall convey to it, by proper deed, all the lands constituting said cemetery, together with the stock, tools, implements, and other personal property pertaining thereto, or commonly used thereon, and with the right to any unpaid balances remaining due for lots already sold, to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for and subject to which the same are now held by said city; and the said corporation shall thenceforth have the entire charge of said cemetery, and of the care of lots and graves therein; and to that end shall receive from said city the annual income, as it accrues, of the funds now held by said city under the provisions of section seventeen of chapter eighty-two of the public statutes, and apply said income to the preservation and care of the lots entitled to such application; and the said corporation shall have in respect of said cemetery all rights, powers, and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof, and shall fully indemnify and hold harmless the said city in regard to the same.

"Sect. 5. The said city shall continue to have the right of burial of persons, for whose burial it is now or shall hereafter be bound by law to provide, in that portion of the westerly end of said cemetery bounded and described in section one, and interments of such persons may either be there made by said city at its own expense, or by said corporation, upon such terms for the cost of preparation and interment as may from time to time be agreed upon between the overseers of the poor of said city and the executive board of said corporation."

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John Taylor and others, owners of lots in said cemetery, who had paid to the city certain sums of money, which constituted part of the funds mentioned in § 4 of said act, and held by the city in trust to use the income in the perpetual care of lots, were permitted to appear as respondents and file an answer. Hearing before *Knowlton*, J., who made certain findings of fact, and reserved the case for the full court on the petition, answers, and such of his findings as were competent to be considered. The facts material to the decision are stated in the opinion.

W. Gaston & J. B. Richardson, (*S. W. Creech, Jr.* with them,) for the petitioners.

T. M. Babson, for the city of Boston.

S. D. Charles, for John Taylor and others.

ALLEN, J. Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public, that is, which the city or town holds merely as an agency of the State government for the performance of the strictly public duties devolved upon it, the Legislature may exercise a control to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. Thus much is admitted on behalf of the city, and the doctrine is stated and illustrated in many decisions. *Weymouth & Braintree Fire District* v. *County Commissioners*, 108 Mass. 142. *Whitney* v. *Stow*, 111 Mass. 368. *Rawson* v. *Spencer*, 113 Mass. 40. *Stone* v. *Charlestown*, 114 Mass. 214. *Kingman, petitioner*, 153 Mass. 566, 573. *Meriwether* v. *Garrett*, 102 U. S. 472. *Mayor, &c. of Baltimore* v. *State*, 15 Md. 376.

By a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of prop-

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erty which will fall within it, because in different States similar kinds of property may be held under different laws and with different duties and obligations, so that a kind of property might in one State be held strictly for public uses, while in another State it might not be. But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the State government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen. *Board of Commissioners* v. *Lucas*, 93 U. S. 108, 114, 115. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 533. *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172. *Cannon* v. *New Orleans*, 20 Wall. 577. *Mayor, &c. of New York* v. *Second Avenue Railroad*, 32 N. Y. 261. *People* v. *Batchellor*, 53 N. Y. 128. *People* v. *O'Brien*, 111 N. Y. 1, 42. *Webb* v. *Mayor, &c. of New York*, 64 How. Pr. 10. *Montpelier* v. *East Montpelier*, 29 Vt. 12. *Western Saving Fund Society* v. *Philadelphia*, 31 Penn. St. 175. *People* v. *Detroit*, 28 Mich. 228, 235, 236, 238. *People* v. *Hurlbut*, 24 Mich. 44. *Detroit* v. *Detroit & Howell Plank Road*, 43 Mich. 140. *Thompson* v. *Moran*, 44 Mich. 602. *Louisville* v. *University of Louisville*, 15 B. Mon. (Ky.) 642. *Richland* v. *Lawrence*, 12 Ill. 1. *People* v. *Mayor, &c. of Chicago*, 51 Ill. 1. *Grogan* v. *San Francisco*, 18 Cal. 590. *Hewison* v. *New Haven*, 37 Conn. 475. The same conclusion is arrived at, after a full and clear discussion of the subject, in Dillon, Mun. Corp. (4th ed.) §§ 66–68, and notes. See also Cooley, Taxation, 688.

In this Commonwealth the question has not directly arisen in reference to the power of the Legislature to compel a transfer of the property of a city or town, but the double character of cities and towns in reference to their duties and liabilities has very often been adverted to. When a city or town acts merely as an agent of the State government in performing duties for the general benefit, it is usually held free from liability to persons who sustain injuries through negligence, except in the case of defective highways, which constitute an exception to the general rule. But in other cases, where an element partly commercial comes in, a liability is usually enforced. *Tindley* v. *Salem*, 137 Mass. 171, 172, and cases cited. *Worden* v. *New Bedford*, 131

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Mass. 23. *Bailey* v. *Mayor, &c. of New York*, 3 Hill, (N. Y.) 531. In such cases, the ultimate question usually is, Did the Legislature mean that the city or town, or other creature of statute, should be liable for negligence, or did it not? *Howard* v. *Worcester*, 153 Mass. 426. *Southampton & Itchin Bridge* v. *Southampton*, 8 El. & Bl. 801, 812. *Cowley* v. *Mayor, &c. of Sunderland*, 6 H. & N. 565, 573. *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686, 707, 709, 710, 721. But in determining this question courts make a discrimination in respect to the character of the duties and of the property which are involved. Nowhere else has this ground of distinction been more often or more strongly insisted on than in Massachusetts. See cases cited in *Tindley* v. *Salem*, 137 Mass. 171, 174; *Pratt* v. *Weymouth*, 147 Mass. 245, 254; *Neff* v. *Wellesley*, 148 Mass. 487, 493; *Lincoln* v. *Boston*, 148 Mass. 578; *Curran* v. *Boston*, 151 Mass. 505, 508. In the recent case of *Merrimack River Savings Bank* v. *Lowell*, 152 Mass. 556, we had occasion to make an analogous discrimination between the general duty which the city of Lowell was under to furnish water on equal terms to all its inhabitants, and the particular undertaking to furnish water for a year to an individual who had paid a year's rates in advance.

In the case before us, we have to determine whether the title of the city of Boston to the Mount Hope Cemetery is subject to legislative control, and this involves an inquiry to some extent into the usages and laws in this Commonwealth relating to burying grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded or have acted merely as agencies of the State government.

In early times, when land was set apart for a burying ground, it was sometimes under the care and control of the town or district, and sometimes under that of the parish. It is said in *First Parish in Shrewsbury* v. *Smith*, 14 Pick. 297, 301, "The fact probably was, that towns, parishes, and proprietors often consisted so nearly of the same individuals, that a grant or appropriation of one of these bodies to another was little more than an appropriation by themselves in one capacity, to the use of themselves in another"; and in *Lakin* v. *Ames*, 10 Cush. 198, 218, "Although in early times the establishment, care, and control of burial grounds, like the support of schools, might have

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been partly a parochial and partly a municipal duty, yet before the erection of a new parish in the town of Pepperell, in 1831, they were regarded as appertaining rather to towns than to parishes." We cannot find either in the statutes or the history of Massachusetts any clear line of distinction between the duty or usages of towns and of parishes in this respect. Sometimes land was set apart or bought and owned by the town or district for this purpose, and sometimes by the parish. Instances of ancient ownership by towns, by districts, and by parishes are referred to in *First Parish in Shrewsbury* v. *Smith*, 14 Pick. 297; *Bachelder* v. *Wakefield*, 8 Cush. 243; and *Lakin* v. *Ames*, 10 Cush. 198; and there appears to be no doubt that money for providing, enlarging, and maintaining them was raised by each of these corporate bodies. More than two hundred years ago the town of Boston bought land for burying grounds, the Chapel, Copp's Hill, and the Granary burying grounds being the earliest. Shurtleff's Top. & Hist. Description of Boston, 182 *et seq.* 1 Memorial Hist. of Boston, 554, 555; 2 ibid. 528, 529. In the general legislation of the Commonwealth, burying places, whether belonging to towns, districts, parishes, or precincts, were early spoken of, in connection with other pieces of land, as "appropriated for the general use, ease, or convenience of the community," and provision was made for defining their boundaries and protecting them from encumbrances. St. 1786, c. 67, § 7, and c. 81, § 6, re-enacted in Rev. Sts. c. 24, §§ 61, 63. By St. 1828, c. 141, § 1, the First Parish in Rowley was authorized to assess a tax for the enlargement of its burial ground, or to purchase a new one, on all polls within the territorial limits of the said parish, and on estates within said limits, for the use and benefit of all the inhabitants living within said limits and their successors forever.

No general statute which in express terms authorizes the expenditure of money for the purchase and care of land for this purpose has been found earlier than St. 1828, c. 107, in which towns, districts, and parishes or religious societies are all put on the same footing. The statute is as follows: "Be it enacted . . . that the inhabitants of each town, district, parish, or religious society within this Commonwealth, qualified to vote in town, district, or parish meetings, shall have power, at any

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meeting called for that purpose, to raise, in the same manner that other town, district, or parish charges may now by law be raised, such sum or sums of money as they shall deem necessary for the purchase of lands for burial grounds, and for the care and preservation of the same." This, as we believe, was merely giving the express sanction of law to what had long been a prevailing usage. The above statute, when incorporated into the Revised Statutes, was divided, the part relating to towns being contained in Rev. Sts. c. 15, § 12, (which included districts, Rev. Sts. c. 2, § 6, cl. 17,) and that relating to parishes being found in Rev. Sts. c. 20, § 18.

The time when exclusive rights of burial in particular lots were first assigned or sold to families or individuals is involved in some obscurity. The power to do this also was probably at first assumed by towns and parishes, and afterwards had the sanction of express legislation. Before the year 1715, private tombs were in use in the Chapel burying ground, and others were added from time to time in that and the other burying grounds of Boston. Shurtleff's Top. & Hist. Description of Boston, 186–193, 200–205, 212, 213, 233, 244, 249, 250. These tombs were sometimes built, it would seem, by individuals, and sometimes by the town and sold to individuals. In an investigation before a committee of the city council of Boston in 1879 concerning the expediency of prohibiting further interments in the King's Chapel and Granary burying grounds, much information as to the early usages in respect to burials and burial rights was brought out, as shown in City Documents of 1879, Nos. 47 and 96, where extracts from the town records are printed. It seems that as early as 1721, and in the succeeding years, the privilege of building a tomb in the Granary burying ground, and probably in the others also, was usually granted by the town officers to any applicant, without direct compensation for the land, but upon certain prescribed conditions as to making and maintaining the wall, and paying a proportion of the expense of a drain. In 1738 certain tombs appear to have been built for the town, and afterwards disposed of by the selectmen; and in 1807 a tomb was sold for $300, and the town assumed control of tombs whose owners had failed to keep them in repair and were out of reach, and voted to "sell them for the advantage of the

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town." Tombs so held by individuals were private property, and transferable as such. An instance of such a sale is found referred to in the town records in 1802, and another in 1807. By St. 1822, c. 93, § 8, tombs in use were exempted from attachment and execution, and in the Rev. Sts. c. 97, § 22, cl. 7, this exemption was extended to rights of burial. This exemption was not limited to tombs and rights of burial in private soil, but clearly included rights possessed by individuals in the public or common burying grounds.

The first private incorporated cemetery company, so far as ascertained, was the Massachusetts Horticultural Society, which by St. 1831, c. 69, was authorized to appropriate a part of its land for a rural cemetery or burying ground; to lay out lots for family and other burying places; and to grant exclusive rights of burial. This was the origin of the cemetery at Mount Auburn, and a new corporation was formed under St. 1835, c. 96, by the name of the Proprietors of the Cemetery at Mount Auburn, which succeeded to the property, powers, and privileges of the Horticultural Society in respect to the cemetery; with the restriction, however, that all of the proceeds of sales of lots which said proprietors were allowed to retain should be forever devoted and applied to the preservation, improvement, embellishment, and enlargement of the cemetery and garden, and the accidental expenses thereof, and for no other purpose whatsoever. This would effectually cut off all right to declare dividends. After this charters for private cemetery companies were not infrequent. See Sts. 1836, c. 46; 1837, c. 130. By St. 1834, c. 187, § 1, re-enacted in Rev. Sts. c. 130, § 21, a penalty was imposed for making a road, canal, etc. "over, through, in, or upon such part of any enclosure, being the property of a town, parish, religious society, or of private proprietors, as may be used or appropriated for the burial of the dead," without consent first obtained. The first general law authorizing the organization of cemetery companies was St. 1841, c. 114, under which any ten or more persons might organize as a corporation for the purpose of establishing a cemetery, with power to take and hold real and personal estate, which should be applied exclusively to purposes connected with and appropriate to the objects of such organization, and with power to lay out lots and to grant exclusive rights of burial.

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The cemeteries owned by towns and cities and parishes were called and considered to be public cemeteries, because they were provided and maintained primarily at the expense of the public. In early times, the parishes were virtually, if not strictly, public corporations. The rights of individuals who were not owners of tombs or lots or burial rights therein must have been subject to such rules and regulations as were established in particular places. An ancient burying ground, where persons of different families were buried, was easily inferred to be a public burying ground. *Commonwealth* v. *Viall*, 2 Allen, 512. *Commonwealth* v. *Wellington*, 7 Allen, 299. But the use of the word "public" by no means implied that exclusive rights to tombs, lots, and burials did not exist therein, by assignment or purchase. By St. 1848, c. 79, relating to a "public cemetery" in the city of Roxbury, express authority was given to the city council to grant exclusive rights of burial, the proceeds to be paid into the city treasury, and kept separate and devoted to cemetery purposes. By Sts. 1855, c. 44, and 1854, c. 390, the cities of Cambridge and Worcester respectively were authorized to manage cemeteries, with a right to sell lots, the proceeds to go in each instance into the city treasury. The use of the term "public burial places," as applied to burial places owned by cities or towns, in which lots are sold to individuals, still continues. Pub. Sts. c. 82, § 17. An example showing that towns were accustomed to sell burial lots to individuals is found in *Fay* v. *Milford*, 124 Mass. 79.

Such being the laws and usages of the Commonwealth before the time when the city of Boston made its first purchase of the Mount Hope Cemetery, the city, by St. 1849, c. 150, was "authorized to purchase and hold land for a public cemetery in any town in this Commonwealth, and to make and establish all suitable rules, orders, and regulations for the interment of the dead therein, to the same extent that the said city of Boston is now authorized to make such rules, orders, and regulations for the interment of the dead within the limits of the said city."

Before any purchase under this statute was made, a general statute was passed which included Boston, St. 1855, c. 257, § 1, providing that "Each city and town in the Commonwealth shall provide one or more suitable places for a burial ground, within which the bodies of persons dying within their respective limits

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may be interred," and forbidding the use for the burial of the dead of any land in any city or town other than that already used or appropriated for that purpose, without permission. It also was, and long had been, the duty of the overseers of the poor of each town to bury paupers and indigent strangers dying therein. St. 1793, c. 59, §§ 9, 13. Rev. Sts. c. 46, §§ 13, 16. (See also, for later statutes on the same subject, Gen. Sts. c. 70, §§ 12, 15; Pub. Sts. c. 84, §§ 14, 17, enlarging their duties.) Being under these positive duties, and having authority under St. 1849, c. 150, to go outside of the city limits for a burial ground, the city of Boston purchased the largest portion of the land of the Mount Hope Cemetery in West Roxbury in 1857, and has since added to the same at various times, and has received large sums from the sale of lots or burial rights, and has expended large sums in the care and management thereof, and about forty acres still remain unsold. There is no suggestion in argument that in any of these particulars it has acted beyond its powers.

We are not aware that the sale of burial rights in this cemetery has ever been limited to inhabitants of Boston. No such limitation is expressed in the ordinance, but sales may be made to any person or persons. Rev. Ordinances, 1885, c. 47, § 4. By St. 1877, c. 69, § 7, re-enacted in Pub. Sts. c. 82, § 15, towns may sell exclusive burial rights to any persons, whether residents of the town or otherwise, in their cemeteries; and this right extends to cities. Pub. Sts. c. 3, § 3, cl. 23. There can be no doubt that the city held this cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or non-residents. With these duties, and also with these rights and privileges, the city has acquired and improved this property. It is not as if the land had been procured and used exclusively as a place for the free burial of the poor, or of inhabitants of Boston. In addition to these purposes, the city has been enabled to provide a well ordered cemetery, with lots open to purchase, under carefully prepared rules and regulations, and thus to afford to its inhabitants the opportunity to buy burial places without being compelled to resort to private cemetery companies, where the expense would probably be greater; and it has done this upon such terms that the burial of its paupers has been prac-

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tically without expense in the past, and it has about forty acres remaining, the proceeds of which when sold would go into the city treasury but for the requirement of St. 1889, c. 265.

The St. of 1889, c. 265, requires the city to transfer to the newly formed corporation, called "The Proprietors of Mount Hope Cemetery," without compensation, this cemetery, with the personal property pertaining thereto, and with the right to any unpaid balances remaining due for lots already sold, and the annual income of certain funds held for the perpetual care of lots. If such transfer is made, all that the city would retain would be the right to bury such persons as it is or may be by law obliged to bury in a certain prescribed portion of the cemetery. Its previous conveyances of lots and rights of burial are expressly confirmed. But it is apparent from the considerations heretofore expressed, that this is not property which is held exclusively for purposes strictly public. The city of Boston is possessed of much other property which in a certain sense and to a certain extent is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of water works, its system of parks, its market, its hospital, and its library. In establishing all of these, the city has not acted strictly as an agent of the State government, for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why the other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability.

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States so that the Legislature has no power to require its transfer without compensation. Const. of Mass., Dec. of Rights, Art. X. Const. of U. S., Fourteenth Amendment.

In judging of the validity of the particular statute under con-

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sideration, St. 1889, c. 265, there are other reasons leading to the same result. The first is, that the duties of the city in respect to providing a burial place for the poor and for persons dying within its limits are not taken away. The city is still bound to provide one or more suitable places for the interment of persons dying within its limits; Pub. Sts. c. 82, § 9; and it is still bound to bury its paupers and indigent strangers. Pub. Sts. c. 84, §§ 14, 17. If this cemetery should be conveyed away, under the provisions of St. 1889, c. 265, the city would be bound to provide another. Certainly the mere continuance of the city's right to bury in a limited portion of the cemetery such persons as the law requires it to bury is not a provision adequate to meet the requirement of Pub. Sts. c. 82, § 9, and by the report of facts the portion referred to is not likely to suffice even for the burial of paupers for any great length of time. The city is bound to provide a suitable place for the interment of persons dying within its limits; not poor persons only, but all persons; and the burial of the dead in ground not sanctioned by the city authorities is strictly forbidden. So far as we know, it has never been held that the Legislature may require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. On the other hand, it is justly assumed that, if the property is to be transferred, the duties will be transferred also. *Rawson* v. *Spencer*, 113 Mass. 40. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 386. *Whitney* v. *Stow*, 111 Mass. 368. *Mayor, &c. of Baltimore* v. *State*, 15 Md. 376. But the duty of burying paupers, and of providing a place for the interment of all persons dying in Boston, is not imposed upon the petitioner. The duties of the city, and the duties of the petitioner under St. 1889, c. 265, are not the same.

Moreover, the legislative power over municipal property, when it exists, does not extend so far as to enable the Legislature to require a transfer without compensation to a private person or private corporation. The control which the Legislature may exercise is limited; it must act by public agencies and for public uses exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality

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of the State, such property is so far subject to the control of the Legislature that other instrumentalities of the State may be substituted for its management and care; but even the State itself has no power to require the city to transfer the title from public to private ownership. Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation. But it was never heard of that the Legislature could require the city without compensation to transfer its city hall to a railroad corporation, to be used for a railway station, merely because the latter corporation has a charter from the Legislature, and owes certain duties to the public.

It is contended in behalf of the petitioner that it is a public corporation, wholly under the control of the Legislature. But it is an error to suppose that a corporation becomes a public one merely by receiving a charter from the Legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power. There is nothing in the case cited — *Woodlawn Cemetery* v. *Everett*, 118 Mass. 354 — to show that the Woodlawn Cemetery was regarded as a public corporation. It clearly was not so. It was said to be subject to the police power, like other cemetery corporations. *Commonwealth* v. *Fahey*, 5 Cush. 408. But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. The distinction between public and private corporations is well marked and clear. Public corporations are governmental and political, like counties, cities, towns, school districts, — mere departments of the government, established by the Legislature, and modified, and destroyed, without their own consent. Private corporations are formed by the voluntary agreement of their members, and cannot be established without the consent of the corporators. Public corporations, as has been seen, may to some extent in relation to the ownership of property partake of the character of private corporations; and, on the other hand, many private corporations are charged with some duties and obligations to the public, as in the case of railroad,

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telegraph, canal, bridge, gas, and water companies. *Lumbard* v. *Stearns*, 4 Cush. 60. *Worcester* v. *Western Railroad*, 4 Met. 564. *Commonwealth* v. *Smith*, 10 Allen, 448, 455. But the general line of distinction between the two classes of corporations is clear. *Linehan* v. *Cambridge*, 109 Mass. 212. *Rawson* v. *Spencer*, 113 Mass. 40, 45. Morawetz on Corp. §§ 3, 24, 1114. 2 Kent Com. 275. 1 Dillon, Mun. Corp. (4th ed.) §§ 19, 22, 44, 54, 56. Angell & Ames on Corp. §§ 14, 30, *et seq.* *University of Maryland* v. *Williams*, 9 Gill & J. 365, 397. *Ten Eyck* v. *Delaware & Raritan Canal Co.* 3 Harr. (N. J.) 200. *Hanson* v. *Vernon*, 27 Iowa, 28, 53. *In re Deansville Cemetery Association*, 66 N. Y. 569.

An examination of the provisions of St. 1889, c. 265, leaves no doubt that the petitioner falls within the class of private corporations. Its corporate members are such of the proprietors of burial lots in the existing cemetery as shall accept the act and notify the clerk of the corporation of such acceptance. Membership is wholly voluntary, and in point of fact only about one person out of eight who were entitled to do so became members. The corporation is to be subject to all the provisions of the Pub. Sts. c. 82, so far as they can be applied thereto, and except so far as inconsistent with St. 1889, c. 265. Chapter 82 of the Public Statutes relates mostly to private cemetery companies, which may be organized by any ten or more persons. *Jenkins* v. *Andover*, 103 Mass. 94, 104. Such private cemetery corporation may lay out its real estate into lots, and upon such terms, conditions, and regulations as it shall prescribe may grant and convey the exclusive right of burial, etc. There is nothing in St. 1889, c. 265, limiting this right, unless in § 5, providing that the city shall continue to have the right of burial, in a certain prescribed portion of the cemetery, of persons for whose burial it is or may be bound by law to provide, viz. paupers and indigent strangers. Subject to this, the petitioner may sell all the remaining lots, as fast as it can, to all applicants. It is true, under Pub. Sts. c. 82, § 2, it cannot make dividends from the proceeds of sales; but the Proprietors of the Cemetery at Mount Auburn, and many other private cemetery corporations, are under the like restriction. If the city retains the ownership, it may devote the proceeds of sales of lots, after providing for the suitable maintenance of the

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cemetery, towards the purchase of a new burial place for its inhabitants when occasion may require. If the petitioner owns it, the city will lose that advantage. No duty to the public is imposed upon the petitioner by the terms of the statute, unless it is contained in the words in § 4 of St. 1889, c. 265, "to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for and subject to which the same are now held by said city"; and the further words, "and the said corporation shall have in respect of said cemetery all rights, powers, and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof." What these duties towards the inhabitants of Boston are, it may be difficult to say. Certainly there appears to be nothing binding the corporation to give any preference to inhabitants of Boston in the sale of burial rights, or to prevent a substantial increase in the prices of such burial rights, at the will of the corporation. In short, there is nothing in the act to secure to the inhabitants of Boston those privileges in respect to burial rights which they might properly expect, even if they could not legally demand the same, from the city itself. There is therefore no ground on which the petitioner can be said in any just sense to be a public corporation, and its duties to the inhabitants of Boston are at best but vague and shadowy.

The city further urges that the obligation of the contracts into which it has entered with purchasers of burial rights, for the perpetual care of their lots, would be impaired by the provisions of St. 1889, c. 265. Since, for the reasons already given, we are of opinion that the statute was beyond the power of the Legislature, it is not necessary to consider this ground of objection to its validity.

Petition dismissed.

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MARGARET PRICE *vs.* WILLIAM S. MOORE.

Middlesex. November 28, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON MORTON, LATHROP & BARKER, JJ.

Agreement to Purchase Real Estate — Authority to Sign Name — Ratification.

In an action against A. B. on a contract in writing to purchase real estate signed by his son, "A. B. by C. D.," it is incumbent on the plaintiff to prove either that the defendant's son had an original authority to sign the defendant's name, or that his act of doing so was afterwards ratified by the defendant.

CONTRACT upon an agreement under seal to purchase real estate, dated May 14, 1891, and executed, in the name of the defendant, by his son, William T. Moore. The defence relied on was that the defendant never made or signed the agreement, or authorized any one to sign it for him. Trial in the Superior Court, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

Besides the agreement of the plaintiff to sell, and the agreement of the defendant to buy, the land in question, the contract contained particular provisions: that the premises should be conveyed within fourteen days from the date of the contract by a warranty deed conveying a good title free from all encumbrances "except $3,500 ($3,000 of which is at 5 per cent, and $500 at 6 per cent)"; that interest was "to be affixed to date of passing papers"; that for such deed and conveyance the defendant was to pay $6,150, of which $100 was paid when the contract was signed, and that a balance of $2,550 was to be paid in cash on delivery of the deed; that the purchaser was to assume the taxes assessed on May 1, 1891; and that the plaintiff was to deliver possession on or before June 1, 1891. On May 23, 1891, the plaintiff offered to perform her part of the agreement by tendering a deed, which the defendant refused to accept. The only question in dispute was whether the defendant had executed or ratified the contract. For the purpose of proving that William T. Moore had been authorized to execute the contract, and that, if he had not been so authorized, the execution of it had been ratified by the defendant, the plaintiff introduced the following evidence.

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William T. Moore, who was present as a witness for the defendant, and was called by the plaintiff, testified that he was the son of the defendant, and was a foreman for the defendant in his business, keeping his accounts; that he was married, and lived in the same household with the defendant; that a short time before the date of the contract he had a conversation with the defendant, and learned that the defendant wanted to move from Boston to Somerville, or some place out of town; that he and the defendant intended to live together in whatever house in Somerville was bought, and that the defendant was to buy it; that he and the defendant visited the property referred to, and walked in and around it, on a Sunday prior to the date of the contract, and shortly before the plaintiff became the owner of the property; that word was sent to the defendant's stand in Boston by a real estate agent named Matson, who was the agent of the plaintiff, that the plaintiff was willing to sell the property; that the defendant told the witness that he had better go down and see Matson; that he went to Matson's, taking a blank check with him, and executed the agreement declared on; that he understood his father wanted to buy the property, if he could get it for that price; that his father knew that it was to be bought for him if it was bought; that the witness passed Matson his own check for $100, and then left an order for the examination of the title; that when he got back to the stand, he told his father that he had left an order for the examination of the title; that he did not remember what his father said; that on that day, or a few days after, he told his father it was understood that there had been $100 paid to bind the bargain, and that, if the balance was not paid, this $100 would be forfeited; that he told his father the price that was mentioned in the agreement; that his father did not authorize him to sign his name, and that he did not inform his father that he had done so. The agent Matson testified that he called on the defendant and asked him to pay the balance of the purchase money; and that the defendant said he did not want the property, and that the plaintiff ought to be satisfied with the deposit. The plaintiff herself testified that, when she tendered the deed of the property to the defendant, he said he did not want the property, refused to give any reason therefor, and did not state that his

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son had no authority to sign the agreement. Upon the foregoing evidence, the judge ruled that the written agreement offered in evidence by the plaintiff could not be admitted, and that the plaintiff could not maintain her action; and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs to all the judges.

J. H. Ponce, for the plaintiff.

N. B. Bryant, for the defendant.

ALLEN, J. It is incumbent on the plaintiff to prove either that the defendant's son had an original authority to sign the defendant's name to the agreement, or that his act of doing so was afterwards ratified by the defendant. There is no sufficient evidence upon either point. The evidence falls short of showing a general authority in the son to bargain for the real estate for his father upon any terms satisfactory to himself; and there is nothing whatever to show that the father had agreed to or even known the various particulars of the contract, as to price, amount and time of cash payment, amount of existing encumbrance, taxes, and time of giving possession. The evidence is equally meagre in respect to ratification. At most, it only went to show an approval of the payment of the one hundred dollars.

Exceptions overruled.

ORRAY A. TAFT *vs.* COMMONWEALTH.
SAME *vs.* SAME.

Suffolk. December 1, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Metropolitan Sewerage Act — Eminent Domain — Expert — Public or Private Way — Prescription — Question for the Jury — Record.

On a petition for the determination of damages for the taking of land for a sewer, a witness is an expert on the effect of sewers who has been admitted as an expert on values, and has testified on the general question without objection, and as such expert he may testify to what extent the taking of part of the land affects the value of the remainder.

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Two petitions were brought for the determination of damages, the first for a triangular piece of land taken in fee simple for a sewer, and the second for an easement of building and maintaining a sewer under a long strip of adjoining land alleged by the respondent to be a public way. The respondent asked for an instruction that the petitioner could not recover additional damages for any use which might be made of the land taken, other than erecting buildings thereon; also that the jury could not consider the probability of smells, noise, or smoke as enhancing damages, even if not so offensive as to create a nuisance. These instructions were refused. *Held*, that the respondent was entitled to a new trial. *Held, also*, that perhaps it would be enough to say, that, as the cases were tried together, and as the second must be retried for certain reasons, justice required that there should be a new trial in the first case also, inasmuch as the damages attributable to the taking of the triangle were not clearly distinguished from those belonging to the long strip.

On a petition for an easement of building and maintaining a sewer under a strip of land, the question whether the strip is a public way by prescription is for the jury.

A relocation of a public way establishing the termini so as to embrace a road denied to have been part of the way, is conclusive upon all persons who were entitled to be heard in the proceedings which led to it. Therefore such persons cannot recover damages for the subsequent laying out of a sewer under such road.

On a petition for the determination of damages for an easement of building and maintaining a sewer under a strip of land alleged by the respondent to be a public way, instructions which lay down too absolutely that, if the public travel bears an insignificant proportion to the private travel over a road, no public way will be established by prescription, are erroneous.

TWO PETITIONS to the Superior Court, for a jury to assess the petitioner's damages under St. 1889, c. 439. The first petition was for the taking, by the Board of Metropolitan Sewerage Commissioners, in behalf of the Commonwealth, of a triangular parcel of land of the petitioner at Point Shirley in Winthrop, containing about 12,450 square feet of upland and 9,000 feet of beach, for the purpose, expressed in the instrument of taking, "of using the same for the construction, maintenance, and operation of an underground sewer or sewers, siphons, gate-chambers, and necessary appurtenances." This taking was recorded on April 30, 1890. The second was for the taking by said board, under the statute as amended by St. 1890, c. 270, of "the right to construct, operate, and forever maintain an underground main sewer, and connecting sewers, drains, manholes, and underground appurtenances," in a strip of land 1,000 feet long and 33 feet wide, which the petitioner contended was a private way, forming part of the parcel of land owned by him, and which the respondent claimed was a part of the public highway in Winthrop, called Shirley Street. This taking was recorded on May 9, 1890. The construction of the

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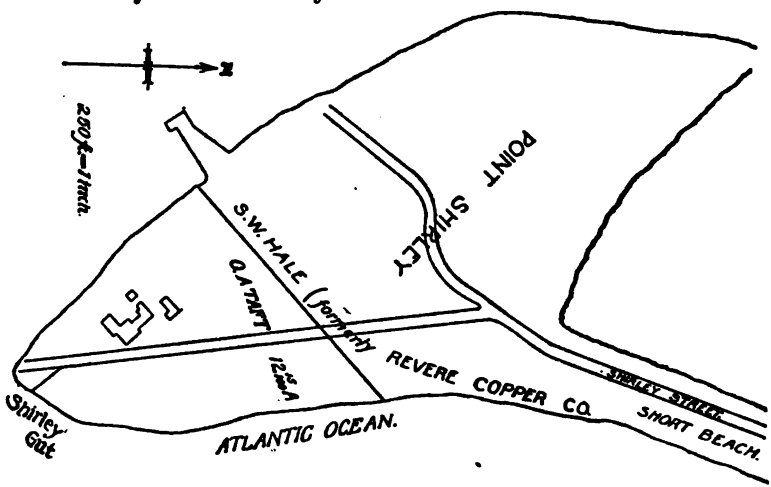
main sewer was begun then, and continued in the way through the petitioner's premises until the following October. The following plan shows the petitioner's land, a part of Shirley Street, and the way in controversy.



At the trial, before *Hammond*, J., the jury returned a verdict for the petitioner in each case, and the respondent alleged exceptions in substance as follows.

At the time of the trial, the main sewer had been constructed, but no gate-chamber, siphon, or other works incidental to the crossing of Shirley Gut had been built.

The petitioner had owned since 1853, and controlled since 1848, a parcel of land containing about twelve acres, bounded on all sides but one by the salt water, and the extreme end being the northerly shore of Shirley Gut, with Deer Island on the other side. This land was flat and even, with sandy soil, with no trees, fences, or buildings upon it except the buildings used by the petitioner as a hotel, with its yard, stables, and outbuildings. At the time of the takings there was a way, without fences at the sides, which extended from a point on what was conceded by both parties to be Shirley Street, through land of one Hale, formerly of the Revere Copper Company, and thence in a straight line through the petitioner's land to his hotel, the corner of which was within about two hundred and twenty-five feet of the high-water mark at Shirley Gut; and the respondent claimed that the way extended in the same direction beyond the hotel to the water; but this was denied by the petitioner. This

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way was built and maintained by the petitioner at his own expense, and there was no evidence that it was built beyond the hotel. The superintendent of streets of Winthrop testified that in 1885 he, as superintendent, made slight repairs "on the way on Taft's land, . . . filled up some holes, and raked the stone off." This was the only evidence of any work done by the town upon the way across Taft's land.

This way, if it had been extended beyond the hotel, would form the westerly boundary of the triangular parcel above mentioned, the northeasterly boundary line of the triangle beginning one hundred and forty-three feet back from high water on said way, and the southerly boundary being said Shirley Gut.

The petitioner, after putting in evidence copies of the instruments of taking, called as a witness one Wadsworth, who testified that he was a resident of Winthrop; that his business was buying, selling, and renting houses and real estate, including boarding-houses not classed as hotels; that he had rented one hundred and fifty to two hundred houses every season; had sold land at the nearest point to Point Shirley, at Great Head, but had not bought or sold land on Point Shirley; that he was familiar with the petitioner's land and knew its value, and had repeatedly seen the main sewer in process of construction. This was all the evidence in substance as to the witness's qualifications as an expert, and he was not questioned as to his knowledge of the extent or character of the use or construction of the siphon and gate-chamber mentioned in the taking.

After giving his opinion as to the market value of the land in question, the witness was asked by the counsel for the petitioner: "How does the taking of this portion of Mr. Taft's land [referring to the plan] affect the value of the rest, and how does the taking of this triangular piece affect the value of the rest, and how does the taking of the part for the sewer, supposing that a sewer is to be constructed there, affect the value of the balance?" The respondent objected to this question upon the ground that it included as an element of damage the taking for sewerage purposes, as to which the witness was not qualified to state his opinion; the objection was overruled, and the respondent excepted. The witness then answered that the remainder of the petitioner's land would be damaged one half of its whole value,

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and further said, in answer to questions by the petitioner's counsel, that one of the principal considerations which led him to this conclusion included the necessary repairing of the sewer, and the interruption of business by interfering with the street, and the knowledge that the sewer was there.

One Newton, called by the petitioner, said that he had lived in Winthrop about eight years; that he had bought a piece of land, with a wharf on it and a building in which he lived, on the harbor side of the town of Winthrop, about a mile and a quarter from the petitioner's land, for which he had paid four thousand dollars, and that he had dealt in other land in Winthrop, mostly in the centre of the town, and land on the shore, amounting to two or three thousand dollars more, and that he knew the petitioner's land on Point Shirley, and had visited it while the sewer was constructing there; that the four thousand dollar lot mentioned was the nearest to Taft's that he had dealt in, and that he had his own idea of the market value of real estate in Winthrop in the neighborhood of Taft's. No other evidence of his qualifications as an expert was offered, nor any evidence to explain or describe the siphon, gate-chamber, or other works which it might be necessary or proper to have upon the triangular parcel in connection with the main sewer, except the instruments of taking. After testifying to the value of the land in question, the witness was asked by the petitioner: "Now, I want you to consider the way the balance of the land is left after taking this piece out here [referring to the plan], this piece off here [pointing out the triangle], and the fact that the sewer is to be constructed, or has been constructed, through this portion there, and that portion is taken by sewerage commissioners to be used in some way in connection with their works; how is the balance of the property affected?" The respondent objected, upon the same ground as above stated. The objection was overruled, and the respondent excepted. The witness then said it would hurt the whole of the petitioner's land one quarter of the full value.

One Floyd, called as a witness by the petitioner, after having been qualified as an expert upon the value of real estate at Point Shirley, but without having been examined or any evidence offered as to his knowledge of the effect of the construction of sewer or other works of similar character upon the market

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value of land, after he had heard the testimony brought out in cross-examination of the respondent's witnesses as to the nature of the works required for the construction and operation of the sewer in question, was recalled, and testified as follows: "*Q.* When you testified to the damage to Mr. Taft's land, from this sewer construction, the other day, did you consider the possibility of an overflow on that triangular piece of the sewerage into Shirley Gut? *A.* I did not. — *Q.* What change, if any, will you make in your testimony in view of that consideration? *A.* I will not make any change in my testimony, but my judgment, I think, was different then. I considered that there would be hardly anything, as I remember it, that would be called a nuisance, and on that consideration I fixed a price. If I am asked now to fix a price, considering that there is to be an overflow — *Q.* What difference will that make in your judgment?" The question was allowed, the objection of the respondent overruled, and the respondent excepted. The witness then answered: "I placed the price then, not knowing what it was to be used for, at fifty cents a foot; I should add twenty-five cents a foot more to the price."

One Meredith, called by the petitioner, testified as an expert to the value of the land taken, and stated that the taking for sewerage purposes injured the remaining land; that the State, as he understood it, had the right to have a large engine pumping night and day in a brick structure like one of those electric light stations in Boston, and that no power on earth could prevent it; that this formed part of his estimate of the damage; and that the value of the whole of the petitioner's land, including the buildings before the taking, was thirty-five thousand dollars, and the damage by the takings he placed at twenty thousand dollars. Upon cross-examination he stated that if it were made certain by law, or in any other way, that no pumping station could be put there, and that no structure other than a stone structure amounting practically to an enlarged manhole two or three feet above the surface of the ground could be constructed, and that he had no right to take into consideration damage from odors, and that the opening of the gate-house would not occur oftener than in ordinary manholes in the streets; that he would consider the damage would be very slight beyond the value of the land taken, which he placed at twenty-five cents a foot for the tri-

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angular parcel, throwing in the beach at that price for the upland without extra compensation, and ten cents a foot for the strip one thousand feet long and thirty-three feet wide. The petitioner called a large number of other witnesses on the same questions.

The respondent put in evidence, without objection, the report of the State Board of Health, referred to in the St. of 1889, c. 439, above mentioned, from which it appeared that the main outlet of the northern trunk sewer was situate under the harbor at the outer end of Deer Island, about one and a half miles from the petitioner's premises. The siphons were inverted iron pipes to go under the bed of Shirley Gut; and the gate-chamber was an underground chamber adapted for shutting off, by gates, the flow through one or more of the siphons. Such gate-chambers might be raised above the surface of the ground to a height of two or three feet, or, if found desirable, to the height of an ordinary building; but there was nothing in the plan of sewerage described in the report which would render the use of a steam-engine on the petitioner's premises, taken as aforesaid, necessary or convenient, and the sewer had been constructed throughout the length of Deer Island at a level which would allow sewage to flow by the force of gravitation from the petitioner's premises, so that there was no occasion for lifting it by means of pumps at that point. The report contained an estimate of the cost of an overflow at Shirley Gut. The respondent's witnesses testified that the discharge through an overflow, if used, would be of the same character as the water in a mud-puddle.

The petitioner testified that he became acquainted with the property in 1830, and controlled it after 1848; that in 1827 a small building was erected there to entertain people who were accustomed to land on the beach; that the people on Deer Island were in the habit of crossing over Shirley Gut and going on Point Shirley and up through the town to Boston; that after the erection of the public institutions on Deer Island, before 1850, the prisoners were transported in the same way until on account of the annoyance that method of transporting was stopped; that the point was originally covered by salt-works, and that in 1850 he tore them down and built the driveway; that the people were wont to walk on the driveway or go anywhere they pleased over sea-beach and upland and that he never made any objection except to heavily loaded teams and on account of some differ-

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ences he removed a wharf where people were accustomed to land; that, many years before, the Mystic water-pipes were laid through the way for the city of Boston, and the Revere water-pipes for his own estate; that telegraph poles were put across his land, but not in front of the house, the wires being attached to the buildings; that he never knew or heard that the driveway down to his house was ever designated by the name of Shirley Street; that members of the city government are still likely to pass over to Deer Island at any time, and parties are likely also to come any time by permits, and that he denied the jurisdiction of the county commissioners in their relocations in 1875 and 1884.

There was also evidence that there had been a horse railroad upon the way in question, some eighteen or twenty years ago, which went down in front of Taft's hotel.

One of the petitioner's witnesses, upon cross-examination, testified that from 1849 until 1857 the repairs upon the way in question were always done by Taft and the folks at Deer Island; that he remembered the way since 1844; that from 1848 until 1857 he went from two to seven times a day over the street; and that he ran a public conveyance from Taft's hotel to Scollay Square, Boston. There was a wharf upon the other side of Shirley Gut, on Deer Island, where a boat was kept and used for ferrying passengers across, and teams were taken across on scows by persons employed by the city of Boston. There was no way, public or private, other than the way in question, which connected the petitioner's hotel or the parcel of land owned by him with Shirley Street, or any public street.

A large number of witnesses, called by the petitioner, and including many old residents of Winthrop, testified that the way in question, after it was built by Taft, had been used and travelled upon by any person who chose, without hindrance; and that prior to that time people had been in the habit of going over the petitioner's land without hindrance to and from his hotel and Deer Island.

The respondent put in evidence a record of the town of Winthrop, showing that in 1868 a street was laid out by the town from a point near Revere Street to Point Shirley, the description being "as marked by stakes on the ground, and according to a plan made by John Lowe." It was agreed at the trial that this plan had been lost. A witness who had worked with Lowe and

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had seen the plan testified that this was not a new street; that it was intended to follow the same course as the old street, said to be two hundred years old; that the street did not cross or touch Taft's land, and that the terminus of this street at Point Shirley, as shown on the plan, was at the wharf of the Revere Copper Works, about fifteen hundred feet west of the terminus of the way across the petitioner's land, which way intersected the street laid out in 1868, as shown on the plan, at a point about one thousand feet back from the water.

It was admitted that this street, from the town up to the point of intersection, in 1875 and for some time before, was called Shirley Street. Beyond that point, it was contended by the petitioner that only the westerly branch was called Shirley Street. A large number of witnesses, long resident in the town, testified that the way through Taft's land never was known as or called Shirley Street, to their knowledge. The respondent contended that the easterly branch (the way in question) was known as or called Shirley Street, and introduced some evidence to that effect, though the petitioner's evidence upon this point preponderated. In 1868 the selectmen drove stakes on each side of the branch leading through Taft's land, at the boundary line between his land and that of Hale, where stone bounds were afterwards placed. No evidence of the time when the westerly branch was constructed as a road was introduced, but the testimony of the witness upon this point was as follows:

"*Q.* On that plan of 1868, how much of it was new and how much of it was old part of Shirley Street? *A.* We proposed to go right where the original was.

"*Q.* That is, you intended to go where the former street was? *A.* Where the former street was, the old landmarks, the old town way, which went away down some two hundred years, as we found in Chelsea.

"*Q.* Then it was not a travelled street as shown on the plan? *A.* It was a travelled street down to the Revere Copper Company's. When we turned and went to the schoolhouse, and then turned to the left and went to the shore, it was not a travelled way; it was open, no fence or anything of that kind, but not a street.

"*Q.* But there was also an equally travelled way to Taft's at that time? *A.* When we got to Taft's, we put a stake up on

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each side where he turned to go down to his house, and they went to Deer Island; and a few weeks ago the stones were still there where we drove the stakes.

"*Q.* Do those stone bounds correspond with those stakes? *A.* Well, we drove stakes, and afterwards the stone bounds were put there.

"*Q.* Did you drive stakes in the position where those stone bounds are? *A.* We put stakes on each side of his private way; I cannot tell you where they are now. I think they are there now, or were a few weeks ago.

"*Q.* Between this land and the land of Hale? *A.* I presume it is Hale, but I have not seen it. The other by our street was filled in, and I was shown where they were; we went to find out where our road was in relation to Short Beach."

The respondent put in evidence the record of the county commissioners, and claimed that it showed the location of a public street across the petitioner's land in 1875.

The record declared that the county commissioners adjudicated the locating anew of Shirley Street, being a continuation of Winthrop Street towards Point Shirley, commencing at the junction of Winthrop and Beach Streets, and being forty feet wide. Then follows the description of the street through the town, and the description goes on: "From this point to Point Shirley the road is but thirty-three feet in width, and is intended to be the same location as was laid out by John Lowe, civil engineer, in 1868, the centre being 16½ feet westerly of corner of lot above referred to, and curving around eastwardly the slope of what is known as 'Green Hill,' belonging to Tewkesbury and others, 16½ feet parallel from railing and sea wall about S. 35° 40′ W. 475 feet, then S. 1° W. 250 feet, thence S. 34° E. 410 feet, thence S. 42° E. 390 feet, to the line of the property claimed by the Revere Copper Company, thence S. 9° E. 225 feet, thence S. 36° W. 940 feet, thence S. 30° E. 1,290 feet, thence S. 1° E. 525 feet, being 16½ feet east of the grounds of Revere Copper Company's works to land of Taft, thence same course 1,025 feet, to beach at Point Shirley. A road was located by Mr. Lowe commencing 250 feet back from the last angle named (course S. 30° E.) and deflecting westward runs by land of said Copper Company S. 40° W. 572 feet, thence S. 87° W. 228 feet, thence S. 36° W. 475 feet, to the beach, passing west of the Revere

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Copper Company's works. This was located thirty-three feet wide. The above description is intended to conform to plans of the same, as made and surveyed by George Wadsworth, civil engineer, and as now defined are hereby relocated."

The certificate of the clerk of the county commissioners was admitted, by consent, as evidence that there was no such plan as referred to in the record in his office, and that he had never known of the existence of such a plan.

The petitioner objected to the introduction of the record, first, because the plan referred to was not produced, and, secondly, because the county commissioners, in relocating Shirley Street, exceeded their authority in attempting to lay a street across petitioner's land where no street of that name had previously existed.

The respondent also introduced in evidence the record of the county commissioners for Middlesex County, in 1884, and also introduced the plan therein referred to. The description of Shirley Street as relocated and established ran through the town, along Short Beach, past the land of Hale (formerly of the Revere Copper works) to high-water mark, substantially as given on an annexed plan. The description continued: "Also a branch commencing at a point in the easterly line of Shirley Street 132.29 feet north of point marked K on plan, and running in a curved line on a radius of twenty feet a distance of 47.72 feet; thence in a straight line tangent to said curve in a southerly direction $542\frac{18}{100}$ feet to the division line between lands of S. W. Hale and another, and O. A. Taft; thence making a slight angle to the left and running about one thousand feet to high-water mark, said line coming on corner of piazza of Taft's hotel, as shown on plan. The opposite side of said branch of Shirley Street is thirty-three feet east of, and parallel with, the above described line, and is connected with the easterly line of Shirley Street by a curved line of 47.5 feet radius. For further particulars see plan made by Whitman and Breck, surveyors, which plan is made a part of this description, and which description is intended to conform to said plan."

The respondent contended that this record showed a location of a public way across Taft's land in 1884. The petitioner objected to the introduction of this record for the second reason above stated, and because the petition appeared to be made by tax-payers and not by inhabitants of the town.

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There was no evidence that a copy of the location of 1875 was ever transmitted by the county commissioners to the clerk of the town of Winthrop, and the present clerk testified that there was no such copy in his office, and that he had never known of any such copy.

A copy of the location of 1884 was transmitted to the clerk of the town of Winthrop, at his request, by the clerk of the county commissioners, in 1890, prior to the takings by the sewerage commissioners, above mentioned.

The petitioner testified that he never knew anything of these actions by the county commissioners, and never applied for or received any compensation for the laying out of the way.

It was shown by the evidence of the superintendent of streets of the town of Winthrop, that in 1884 he placed two stone bounds upon the lines of that part of the street which extended over the petitioner's land, both at the end next to the estate of the adjoining owner, and at Point Shirley near the line of high-water mark.

The description of the location in 1875 coincided, substantially, with that of 1884, and the taking by the Commonwealth of the easements in question, viz. the record taking, was within the lines described as a "branch" in the commissioners' record last mentioned. All the evidence material to the question of whether or not the way through the petitioner's premises was a public way or a private way at the time of the takings by said sewerage commissioners, is herein substantially set forth. Upon all the foregoing evidence, the respondent asked the judge to rule that the way was a public way, either by prescription or by record, a town way or highway, which ruling was refused, and the respondent excepted.

The respondent in its prayer asked the following instructions:

"1. That the petitioner can recover no damages under his second petition for the taking of the rights in question. 2. That the petitioner cannot recover additional damages in these proceedings for any use which may be made of the land taken, other than erecting buildings thereon. 3. That the jury cannot consider whether offensive smells, noise, or smoke may not be caused by the use of said premises for sewerage purposes, as enhancing damages, even if not so offensive as to create a nuisance in law. 4. That the city of Boston had a right of way

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by prescription over the way in question, at the time of said takings."

The judge refused to give these instructions, and instructed the jury as to the questions raised by the respondent's prayer above stated, as follows:

"1. You have also the right to take into account the purpose for which it was taken. The taking of this triangle for a public park, might possibly be considered by you to be a benefit to the adjoining land; and nothing is more common than for an assessment of betterments to be made, where parks are constructed, upon land adjoining, on account of benefit caused by the park. Another use might seem to you to be objectionable, and it is claimed by the petitioner that the use to which the property is put is of itself a detriment to the market value of the remaining land. I instruct you that in so far as that sewer comes nearer to the remaining property by reason of the taking of the triangle you have a right to consider the detriment which it will be to the market value of the remaining property. You have no right to assume that a nuisance is to exist there, except so far as it is a necessary consequence of the sewer. You are to assume that the sewer will be properly taken care of. The existence of the sewer is authorized by the Legislature, but it means a sewer properly taken care of. You are not to assume the existence of any negligence on the part of those who take care of it, but what is the reasonably necessary consequence to the adjoining land by the taking of that land for the purpose for which it was taken. It is contended by the petitioner that, by reason of the tides, a nuisance may be created there. I instruct you that, if nuisances are created by the tide, it is the duty of those who have charge of the sewer to abate the nuisance, and you are not to take that into consideration unless you find that nuisances must necessarily be created, and by the proper operation of the sewer. Even if they are created, it is not the right of the public to create a nuisance. A nuisance may be abated. I mean you are to take into consideration only such objectionable things as arise from a proper use of the sewer.

"I instruct you that whatever works hereafter may fairly be deemed to be important, reasonably necessary or reasonable in the operation of that sewer, which ought to be erected, or could be erected, upon this land if needed, are to be taken by you into

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consideration. That is the purpose for which the land is taken. Not only the changes, the physical changes, which have taken place there, but what physical changes are you satisfied upon the evidence it may be reasonably apprehended will take place there in the construction of this sewer? If you find that, by reason of the taking of this land, the market value of the remaining land of the petitioner is lowered, by reason of the fact that the sewer is nearer this land than it would otherwise be by reason of the taking of this triangle, that you may take into consideration. In a word, seeing the fair market value of that strip of land, if you find that the remaining property has been benefited by the taking of the triangle, then subtract from the value of the triangle the benefit; if you find it has been damaged, add the damage to the remaining land to the value of the triangle, and that will be the damages caused by reason of taking the triangle.

"2. As to the strip of land contended by the respondent to be a highway. It is claimed by the petitioner that there is no highway, that it is a private way, that it is his way; that nobody has a right to go over it, and that he can close it whenever he sees fit; that he has kept it open for access to his hotel because his hotel was situated some distance from the line of his land (of course he had the right to build a private way through his own land); and that there has been no use of that road by the public in any such sense as to give the public the right to use it, as to make a highway of it. On the other hand, it is claimed by the respondent that for many years prior to the time when this hotel was constructed, or when Mr. Taft went upon that land, there had always been a way across his land substantially where his road is; that the way had been used by the public, and all persons went upon it or through the land as they saw fit, and that the public had so gone; that it has been recognized as Shirley Street; that the county commissioners have been upon it and have laid it out as Shirley Street, and that it is a public highway, and was at the time this thirty-three feet strip of land was taken. This is an important question, because I instruct you, as matter of law, that if that was a highway, a public street, then the petitioner cannot claim any damages for the construction of the sewer in the street, or for the taking of the land. As it is contended by the Commonwealth that the street

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ran the whole length of this strip of land, if you find it did so run the whole length, and was a public street, then I instruct you that this petitioner cannot recover under his petition for the taking of the land.

"Speaking generally, it may be said that, when land is taken for a public street, damages are supposed to be given to the landowner for whatever uses, incidental to its use as a street, the land may be hereafter put to by public authority. Horse and electric cars now exist in our public streets; they may be said, perhaps, to be a more detrimental use of a public street, or at least a different use of a public street, from that in which travel ordinarily was. And yet no abutter upon the line of a street has any claim for damages by reason of the existence of these cars upon the street. Sewers, water-pipes, and gas-pipes are laid in the street, telephone poles and telegraph poles are erected; and yet, in the absence of any special provision giving damage for such a thing, it is held that he who abuts upon a highway or even he who owns the land to the middle of a highway, subject to the rights of the people to such highway, has no claim for damages for these various things. And I instruct you that in so far as this sewer ran through the public highway, the abutter upon the highway, or the man owning land at the end of the highway, has no claim for damages caused by the taking of the land in the highway for the construction of that sewer, or for the interruption to the use of the highway while the sewer is being constructed.

"One claim of the petitioner is that he has been hindered in the use of his hotel by reason of the blockade of that way. If it is a public way, he cannot recover. If it is a private way, he can, within certain limitations which I shall give you in a moment.

"How are you going to tell whether that was a public way or not? By what rules, on what evidence, are you to decide that question? Often public ways are laid out by record. Sometimes one board of public officers, sometimes another, but always a board of public officers, lay out a street where it is laid out by record; and then the only thing which it is necessary to do in order to show that a certain street has been laid out as a street is to bring the record disclosing that fact, and show that entry has been made upon the street for the purpose of constructing it within the time required by law. It is not necessary to

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show there has been any public travel upon it, if it has been so laid out.

"Ways may exist also by prescription. If you allow somebody to pass over your land under a claim of right for twenty years, thereafter you cannot dispute that right; you have had twenty years in which to dispute it; the man has exercised the right for twenty years, and if you allow him to do it for twenty years, he has a right there exactly as if you had given it to him by deed. So streets in this Commonwealth are formed in this way; and in many cases in this Commonwealth you cannot find the records, the street never was laid out by record, but it had its origin in this, namely, that people, the public, under a claim of right, have walked over the land for twenty years or more, and, having so walked, the street becomes a highway; a public highway, to be supported at the expense of the public, and having all the elements of a highway. Those are the two methods of laying out highways which are material to these cases.

"It is contended by the respondent that this highway was laid out by prescription, that is, that people have gone over it; that the public have gone over it under a claim of right; not that each man as he entered said he had a right to it, but as if having the right, and with the consent of the owner, the public have gone over it for twenty years, so that it has become a highway. That is, that it was such a highway before 1890, when this land was taken. In addition to that it appears that in 1875 the county commissioners of Middlesex County, who were the public authorities charged with laying out ways in Winthrop, laid out this way; and that they did it in 1884 also. But I instruct you, as the petition to the county commissioners in 1875 did not ask for the laying out of a new way, but only for the alteration and relocation of an old one, and Shirley Street is the only street that is named in the petition that is applicable to this land, that, that laying out is not to be taken by you into consideration, unless you find that this land in which this strip was taken, or some part of it, was Shirley Street, so called, and known as Shirley Street, or unless it was a highway before 1875.

"I had better speak of it first in reference to whether it is a highway by prescription. If it is a highway by prescription, you do not care anything about the records. I instruct you, as matter of law, that if you are satisfied that the strip of land

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shown upon the plan has been used as a highway by the public travelling over it under a claim of right, continuously and uninterruptedly, that is, substantially, when any one desires to go over there, that there has been an adverse, continuous, and uninterrupted use of that land by the public in passing over it as the public would be likely to pass over a street in that vicinity, then it is a highway, whether it was ever laid out by the public authorities as such or not. But it is necessary for it to be shown to you that the public went over it as the public, that is to say, that people travelled there as they saw fit without permission or without relying upon the permission of the owner, under a claim of right, acting as if they had the right there, and that that travel has been continuous, that is, never interrupted by a fence, and has been what might be regarded as public travel; not that people must go across there every day, but, having the occasion to go in that vicinity, people, if they went there under a claim of right, crossed the road and were never interrupted, and that has continued for twenty years consecutively, then I instruct you that the land over which such travel went was a highway. And as it is not claimed, as I understand it, that the present avenue differs any from the highway, if any did exist there, then it would be a highway; if before 1875 any portion of the present avenue was so used and was called Shirley Street, not that it was the only street so called, but if it was known as Shirley Street, not if that is the only name it was known by, but if it did have the name of Shirley Street, if it was a highway prior to that time and had that name, then it stands as laid out in 1875 and as laid out in 1884. And if boundaries were thereafterwards placed, then that is a sufficient taking of the land to justify you in finding that the highway was laid out in 1884.

"There is no claim of a record prior to 1875. This highway then, if it existed before 1875, existed by virtue of prescription, that is to say, by virtue of twenty years' travel, as I have explained it to you. And if you find that the people, that the public, under a claim of right, continuously, that is, without interruption, travelled over the land in which this sewer is, this thirty-three feet strip of land, then that was a highway. If you find that they travelled over any part of it, and it was known as Shirley Street commonly, no matter whether there was some other Shirley Street or not, no matter whether it had some other

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name or not, if one of its names was Shirley Street, then I instruct you that the county commissioners had the jurisdiction to alter and change it in 1875 and in 1884. And as it is not contended that any different or other line was taken in 1884 than in 1875, or that the street was changed in any respect by that laying out from what it was before upon the surface of the ground, I instruct you that the making of boundary lines, the setting of boundary stones upon the street or upon any part of Shirley Street, whether there or elsewhere, is a sufficient entering to establish that laying out. If there was a highway there, then I instruct you there can be no recovery under this first petition.

"It is felt by counsel that I have not stated some things that ought to be stated to you with reference to when the use of land which a man himself uses for a street by the public may make it a public highway. It is conceded by the petitioner that this strip of land was used for going to and from his house, and that it was used by many people; in fact that it was the only access by land to his house, and it is felt that I have not stated to you what sort of use it is that, where there is a private use, will justify a claim that the street is public. I will use two illustrations. It sometimes happens that a man travels over his own land himself, he and his agents and his servants, in the exercise of his right as the owner, and as agents and servants and visitors go over and see him, not exercising any right against him, but using it under his rights. In some places where there are large manufactories, we sometimes find this condition of things. A lot of land is bought, a factory is put up, and the corporation owning the factory and the land builds houses, and it is possible you can conceive of a case where there is a street on the north side and a street upon the south side, and the factory perhaps upon the east, of a certain lot of land, — the corporation buy that land, cut it up into lots, and put a private street through for their own accommodation and for the accommodation of their employees who live in the houses. And you will see cases where those private streets are constructed like a public street, with sidewalks, with brick buildings on each side, running from the street upon the north to the street upon the south, so that anybody passing by would, perhaps, see no difference between that way and a public street. The idea of the corporation, in forming the street that way, is to accommodate

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the people in the houses, their visitors, the marketmen, the grocers, and such other people as have occasion to transact business with the people in those houses. That is a private street, although it may happen that many travellers, not seeing the difference, will go through that street, not having any business whatever with the people upon the side of the street. That is to say, the private travel there to and from those houses is the main purpose of the avenue, and the travel of a few people through there as a part of the public, not having business with those in the houses, is merely incidental and insignificant compared with the private travel. In such a case as that, although you might be satisfied that for years the public had, to a certain extent, travelled through such a road, yet, as the road itself is so much more travelled by the private persons for private purposes and private reasons, that the public travel bears an insignificant and merely incidental relation to the private travel, no public road would be formed by such public travel.

"On the other hand, suppose there is a way over a man's land in the country, and he goes over it perhaps once a year logging in the winter, but the public go over it constantly and freely, so that you may say that in that case although there is an exercise of a private right to go there by the man who owns the land, still that the main purpose and object of the road is for public purposes, and that the public use of the road outweighs, to a great extent, the private use, — indeed, that the private use is small in fact, while the public use is considerable, — in such a case of public use as that, you might well be warranted in finding that the public had made a public use of the road, and that it would in time, at the end of twenty years, be a public highway, although somebody had travelled there in the exercise of a private right. So when you come to the strip of land over which people have travelled in the exercise of a private right and also in the exercise of a public right as one of the public, and are asked to say whether the travel of the public has been such as to make that a highway at the end of twenty years of such travel, you are to take into consideration the relative importance of the public and the private travel, and to say whether one outweighs the other to such an extent as to authorize you in finding that, as such public travel, the public have acquired the right. And you can get the best at this by the illustrations which I have stated.

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It is not necessarily fatal to the acquirement of a public right by twenty years' travel that somebody has also travelled over his private road. And on the question whether twenty years' travel by the public over a given strip of land makes a highway, you may take into consideration the relative importance and bearing of such travel with reference to the private travel over the same land. In this case, if you find that the private travel over this highway, over this strip of land, altogether outweighed the public travel, and that the public travel was insignificant, merely incidental in comparison with it, then, notwithstanding the public went over that road, if that was the nature of the public travel, you might be justified in finding that no right existed, although there had been such public travel.

"It is stated to me by the respondent that it is possible you may be satisfied that although the city of Boston in its corporate capacity had acquired no right to travel there, yet that there was a private right to go across other than a public right. That is to say, even if you should not be satisfied it was a public highway, still that it might be that some people had the right to travel across there in the exercise of a private right; that is, that the city had a right to go across there, its agents and servants, in the exercise of a private way, to go to Deer Island. If you find that that was not a highway, but still find that there was a right to the inhabitants of Deer Island or those who do business with them to go across there, not such as to make a public way, but to give the inhabitants of that island a right to go across, that would not prevent Mr. Taft from maintaining his petition here for damages, but would limit the amount to which he would be entitled if you find that that land had been devoted to private travel, and it was not so much of an encumbrance upon it to put a sewer on it as it would have been if it had not been devoted to private travel."

The respondent excepted to the refusal to give the instructions prayed for by him, and also to those given, so far as inconsistent with its prayer.

The jury found for the petitioner in each case; and the respondent alleged exceptions.

W. D. Turner, for the respondent.

C. S. Lincoln & S. J. Elder, for the petitioner.

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HOLMES, J. These are two petitions for the determination of damages under the Metropolitan Sewerage Act, St. 1889, c. 439, § 4. The first is for a triangular piece of land on Point Shirley at Shirley Gut, taken in fee simple for a sewer, etc. The other is for an easement of building and maintaining a sewer under a long strip of adjoining land alleged by the respondent to be a public way. The petitions were tried together, and the case is here on exceptions.

The first exceptions were to allowing certain experts to testify how the taking of a part of the petitioner's land for a sewer affected the value of the rest. The only ground stated for the objection in the first two instances, and seemingly the only one in the last, although that is not quite so clear, was that the witness was not qualified to state his opinion. We see no reason for revising the action of the presiding judge on this ground. It was said that the witnesses were not experts on the effects of sewers. But they had been admitted as experts on the values, and had testified on the general question without objection. We cannot say that it was wrong to allow any proper questions of detail. Experts may be asked the effect of a taking. *Vandine* v. *Burpee*, 13 Met. 288. *Brainard* v. *Boston & New York Central Railroad*, 12 Gray, 407. *Dickenson* v. *Fitchburg*, 13 Gray, 546, 557. *Chandler* v. *Jamaica Pond Aqueduct*, 125 Mass. 544, 552, 553.

The next question with which we have to deal is more difficult. Whatever may have been the implied ground of the objection to the foregoing evidence, in one instance it was general in point of form. Later, the respondent asked for an instruction that the petitioner could not recover additional damages for any use which might be made of the land taken other than erecting buildings thereon. Also, that the jury could not consider the probability of smells, noise, or smoke as enhancing damages, even if not so offensive as to create a nuisance. These instructions were refused, and the respondent excepted. The testimony of the experts enhanced the damage to the petitioner's remaining land from the fact that the part taken was to be used as a sewer, on various grounds, such as the possibility of a brick structure with pumping engines, (which there was no ground to anticipate on the evidence,) the possibility of a nuisance from an overflow

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at Shirley Gut, (of which, at most, there was but a scintilla of evidence,) the interference with the street by necessary repairs, knowledge that the sewer was there, underground. The jury probably understood, from the instructions they received, that after having allowed the value of the land taken, and any harm to the remaining part in point of size, shape, etc., (*Maynard* v. *Northampton*, 157 Mass. 218,) they had a right to add any and all diminution in the selling value of the latter due to the prospect of a sewer, as we shall state hereafter, subject to the caution, based on *Badger* v. *Boston*, 130 Mass. 170, that they were not to consider the possibility of a nuisance being created by keeping the sewer improperly. We think that the questions raised by the instructions are fairly open. There is no doubt that they had a most important bearing on the amount of damages allowed.

What the presiding judge had in mind evidently was a refined exception to a rule of uncertain scope. The rule denies the allowance of damages for some quasi nuisances, such as smells, etc., in proceedings under various statutes. *Eames* v. *New England Worsted Co.* 11 Met. 570. *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1, 6. *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385, 392. *Massachusetts Central Railroad* v. *Boston, Clinton, & Fitchburg Railroad*, 121 Mass. 124. Whether this rule would extend to a nuisance which would have been actionable but for a statute authorizing works of which it was a necessary consequence, is a question. The lines of decisions just referred to started from the assumption that the harm either was *damnum absque injuria* or remained actionable. *Eames* v. *New England Worsted Co.* 11 Met. 570, 572. But some statutes may authorize works such as we have supposed, and in such cases, in order to subject neighboring lands to the burden, it might be unnecessary, because impracticable, to file in the registry a description of the lands to be affected, such as is required when the surface of the land is to be flowed. *Kenison* v. *Arlington*, 144 Mass. 456. Again, no doubt the Legislature can change the law of nuisance to some extent without compensation. *Sawyer* v. *Davis*, 136 Mass. 239. *Rideout* v. *Knox*, 148 Mass. 368, 372. *Miller* v. *Horton*, 152

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Mass. 540, 546. But we are not aware that it has been decided that the principle of the Massachusetts decisions cited extends so far. In England the rule seems to be, that those damages can be recovered which could have been recovered at common law for an injury to land, or to an interest in land, had the acts which caused them been done without authority of statute. *Caledonian Railway* v. *Walker*, 7 App. Cas. 259, 293. Some of our decisions go even further than that, and no uniform principle has been established. *Marsden* v. *Cambridge*, 114 Mass. 490, 492. *Woodbury* v. *Beverly*, 153 Mass. 245, 247, 248. See *Stanwood* v. *Malden*, 157 Mass. 17.

The exception to the Massachusetts rule denying damages for quasi nuisances authorized by statute is that some annoyances, which otherwise could not have been recovered for, may enhance the damages allowed in so far as they are brought nearer to the petitioner's land by the taking of a part of it. The petitioner is "entitled to recover, not only compensation for the land taken, but also for such injury to his remaining land as is caused by the appropriation of a part of it for the uses for which it is taken." *Johnson* v. *Boston*, 130 Mass. 452, 454. Not, it will be observed, an arbitrary principle that taking part of a petitioner's land lets in a claim to damages otherwise not allowable, (compare *Blesch* v. *Chicago & Northwestern Railway*, 48 Wis. 168, 189, 190,) but only that so far as increased proximity is the source of the trouble it may be allowed for. The difference between the annoyance just outside the petitioner's original parcel and the same in its intended place is the measure. *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10. The distinction, if difficult to apply, is logical with reference to matters in the nature of nuisances which would not have been actionable apart from statute, but it must not be carried too far.

Probably, when it becomes necessary to decide it, the law of Massachusetts will be found to be, that within the limits within which the Legislature can legalize what at common law would be a nuisance, no petition can be maintained if the quasi nuisance is the only damage inflicted on the plaintiff under the statute relied on. The infliction of such damage is not regarded as a taking of land sufficient to lay a foundation for proceedings.

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If land is taken, the extent of the recovery may be affected by the language of the particular statute, but generally speaking, so far as by taking a part of the petitioner's land a source of harm is brought nearer to the part which is left, the damage caused by the increased proximity may be recovered for, whether apart from the statute the source of harm would have amounted to a nuisance or not.

The presiding judge had the principle of *Walker* v. *Old Colony & Newport Railway* in his mind; but we fear that the jury understood the last words of the charge on that point, taking it in the light of the evidence admitted under objection and of the instructions refused, as meaning that, if they found the remaining part of the petitioner's land had been damaged by any of the lawful effects of any prospective sewer or its appurtenances in that neighborhood, either on the land or on the imaginations of men, if affecting the market value, they were to allow the whole amount. Under this head, in view of the evidence, the jury probably took into account, on the one hand, imagined nuisances which would have been actionable unless authorized by the taking, and on the other, possible quasi nuisances which would not have been actionable, and finally the detrimental effect on market values of the mere fact of there being a sewer in the neighborhood apart from any annoyances at all.

Most of these evils, so far as not imaginary, are due to the taking of the easement in the long strip, not to the taking of the triangle. That enables the sewer to be built, and brings it nearer to the petitioner's land than if it were on the triangle. The distinction is particularly important in view of the decision which we have reached upon the second petition. So far as appears, if there is to be an overflow, it is an incident of the use of the long strip, not of the use of the triangle. The only ground suggested for giving more upon the first petition than the value of the land taken, and the diminished convenience, if any, of the remainder in shape or size, was the possible construction of a building with pumping engines. There was no evidence that such a building was to be expected, and certainly a jury should not be told to increase the damages by considering what would be the most disagreeable use to which land

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lawfully could be put by an owner. The general possibility of disagreeable uses is paid for in the price of the land. See, further, *Fairbanks* v. *Fitchburg*, 110 Mass. 224.

We are of opinion that there must be a new trial on the first petition, and we do not deem it necessary or advisable to go further than we have done in answering the questions which we have suggested. Perhaps it would have been enough for us to say, that, as the cases were tried together, and as the second must be retried for reasons to be stated, justice requires that there should be a new trial in the first case also, inasmuch as the damages attributable to the taking of the triangle were not clearly distinguished from those belonging to the long strip.

The other exceptions relate to the second petition. The first question is whether the judge ought to have ruled that the strip mentioned was a public way. So far as the evidence that it was so by prescription goes, no reason is suggested why the judge was not right in following the ordinary course, and leaving it to the jury. Apart from any question as to the truth of the evidence, and assuming that the jury would have been warranted in inferring that there was a way by prescription, as no doubt they would have been, they might have found the contrary, on the evidence that some uses were by the petitioner's leave, and some were stopped by him, and possibly even they might have found that there was no defined way at all, but only free wandering by the guests of the hotel and others over sea-beach and upland of barren sand. They were warranted also in not interpreting the petitioner's statement that the city always had a right of way through them, etc., as a concession of the point in dispute.

But it was said, if not a public way by prescription, it was one by record, and the respondent relies upon a relocation in 1875, and another proceeding in 1884. The petitioner denies the jurisdiction of the county commissioners. In the case of the proceedings of 1875, the denial is based on the allegation that the branch road, if there was one, which ran through Taft's land, was no part of Shirley Street, and so that the county commissioners' act purporting to relocate it was void. The judge, in his charge, made the jurisdiction depend upon whether the road was travelled by the public and was known

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as Shirley Street. The question is an embarrassing one. Of course a tribunal cannot establish its own jurisdiction by adjudicating it to exist. *Adams* v. *Adams*, 154 Mass. 290. *Miller* v. *Horton*, 152 Mass. 540, 548. No doubt, too, in an extreme case, at least, the objection that the alleged relocation really was an attempt to lay out a new and different way, would go to the jurisdiction. See *Commonwealth* v. *Cambridge*, 7 Mass. 158. On the other hand, one of the objects of a relocation is to make certain what before was doubtful, (Pub. Sts. c. 49, § 31,) and to establish it against and in favor of all the world, by a proceeding to which all interested are parties. If, under the name of jurisdiction, the validity of the proceeding is to be made dependent in every case upon proof that the lines established coincided with those previously existing, the proceeding is of very little value. It may be said that this consideration cannot be pressed to an alleged extension or change of terminus. Yet the terminus may have been the very point of uncertainty. There may have been conflicting evidence before the county commissioners in 1875, as there was before the jury in the trial of this case, as to what was Shirley Street. One of the reasons why it is held not to be necessary to set out the termini of the way named in a petition for relocation would seem to be the possible uncertainty of them. *Hyde Park* v. *County Commissioners*, 117 Mass. 416, 422. There is no reason to doubt that the county commissioners acted in good faith. The road in question was a mere spur of Shirley Street proper, even if not part of it. The decision that it was part of Shirley Street was not absurd, even on the evidence produced at this trial, as to the state of things before 1875. If this reasoning is not sufficient to show that the adjudication of the county commissioners is valid as against all the world, we are of opinion that at least their decision must be held conclusive against a party who might have been heard in the proceedings which led to it. See *State* v. *Rye*, 35 N. H. 368, 377, 378; *Blackstone* v. *County Commissioners*, 108 Mass. 68; *Perry* v. *Sherborn*, 11 Cush. 388, 391; *Old Colony Railroad* v. *Fall River*, 147 Mass. 455; *Brewer* v. *Boston, Clinton, & Fitchburg Railroad*, 113 Mass. 52. 56, 57.

If there was any failure to give proper notice, which we do not intimate, or other defect in the form of the proceedings

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which would not be disclosed by the record, advantage can be taken of it only by certiorari. *Foley* v. *Haverhill*, 144 Mass. 352.

In the view which we take of the effect of the record of 1875, it is unnecessary to consider the record of 1884, or the instructions to the jury on the matter of prescription. But we think it desirable to add that the instructions laid it down too absolutely, that if the public travel bears an insignificant proportion to the private travel over a road, no public way will be established by prescription. In making this correction we do not forget the similarity of the instructions before the court in *Weld* v. *Brooks*, 152 Mass. 297. We agree that the proportion is a matter to be considered. But it is not necessarily decisive in the case of a remote and barren point, where the greater part of the travel of course is that of visitors to the hotel situated there. See *McCreary* v. *Boston & Maine Railroad*, 158 Mass. 300, 305. *Exceptions sustained.*

BOSTON FURNACE COMPANY *vs.* JOSEPH C. DIMOCK & others.

Suffolk. December 2, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mechanic's Lien — Evidence — Materials furnished.

A mechanic's lien cannot be maintained if there is no evidence that portable ranges for which the lien is claimed "were to be furnished as parts of the several houses in which they were put," or were "applied so as to constitute parts of the buildings," within the meaning of *Turner* v. *Wentworth*, 119 Mass. 459, 465. KNOWLTON & LATHROP, JJ. dissented, on the ground that there was evidence for the jury. HOLMES & BARKER, JJ. thought that the test of what are materials used in the erection of a building, within the meaning of the Pub. Sts. c. 191, § 1, is structural connection with the building, and so agreed with the majority.

PETITION, under the Pub. Sts. c. 191, to enforce a mechanic's lien against Joseph C. Dimock, the Boston Five Cents Savings Bank, Estelle M. and Andrew A. Meyer, George L. Wentworth, and John A. Noonan, for labor and materials furnished in the erection of certain buildings. The respondent Dimock was

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the owner, and the respondent Savings Bank and Estelle M. and Andrew A. Meyer were mortgagees of the property on which the lien was claimed. The respondents Wentworth and Noonan were the assignees in insolvency of Dimock, under an assignment made after the certificate of lien was filed in the registry of deeds. Issues for a jury were framed. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

The land described in the petition was owned by Dimock from January, 1890, until after the date on which the certificate of lien was filed. It was mortgaged by Dimock to the respondent mortgagees on July 19, 1890. The petitioner ceased to furnish labor and materials on November 14, 1890, and within thirty days thereafter, on December 8, 1890, filed its certificate of lien in due form.

The first of the several issues framed for the jury was as follows: "Did the plaintiff furnish labor and materials as alleged, or any part thereof, which were used in the erection of buildings on the premises described in the petition, and were such labor and materials of such character and furnished under such a contract that a lien may be maintained therefor?" The other issues turned out to be immaterial. The petitioner introduced evidence tending to show the following facts. In 1890 the respondent Dimock was engaged in building, on the property referred to, a block of apartment houses, and on April 21, 1890, when about two stories of the houses were completed, he entered into an oral contract with the petitioner, through its agent, one Becket, by which the petitioner agreed to furnish sixteen No. 7 hot closet cyclone ranges, with hot-water fronts, together with zinc, pipes, and couplings, the ranges to be set up in the buildings by the petitioner in such a manner that nothing would remain to be done except for the plumber to make the connections between them and the hot-water boilers. The ranges referred to in the contract were known in the trade as portable cooking ranges with hot-water fronts, and were intended to be set on the zinc which was to be laid upon the floor. Each range was to be connected with the chimney by a pipe or funnel, and the hot-water front of each range was to be coupled by a plumber to the hot-water boiler. The hot-water

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boiler was to be connected with the pipes which supplied the buildings with water, and from it the hot water heated by the range was to be carried to the sink, bath-tub, and washbowls. Each suite was to be fitted in this manner. Some time in October, 1890, the respondent Dimock, having so far completed the apartment houses that he was ready to have the ranges put in, requested the petitioner to deliver them. This the petitioner did, and set them up as agreed. The last lot left the petitioner's rooms on November 11, 1890, and were set up by the petitioner within a day or two afterwards. A plumber, who was a stranger to the petitioner, subsequently made the couplings between the range and the hot-water pipes and the tank in each suite, as had been intended.

The foregoing was all the material evidence introduced by the petitioner. At the close of the petitioner's evidence, the judge ruled, as requested by the respondent mortgagee, that there was no evidence that labor had been performed or material had been furnished by the petitioner in the erection of a building, within the meaning of the Pub. Sts. c. 191, and directed the jury to answer the first issue in the negative. The petitioner alleged exceptions.

The case was argued at the bar in December, 1892, and afterwards was submitted on the briefs to all the judges.

H. G. Allen & W. R. Howland, for the petitioner.

W. M. Stockbridge, for the respondents Estelle M. and Andrew A. Meyer.

HOLMES, J. In the opinion of a majority of the court, there was no evidence that the portable ranges for which the lien is claimed "were to be furnished as parts of the several houses in which they were put," or were "applied so as to constitute parts of the buildings," within the meaning of *Turner* v. *Wentworth*, 119 Mass. 459, 465. See *Dimmick* v. *Cook*, 115 Penn. St. 578; *Schaper* v. *Bibb*, 71 Md. 145. In the opinion of Mr. Justice Knowlton and of Mr. Justice Lathrop there was evidence, and the case should have been sent to a jury. I concur in that opinion, if the question what would pass as between vendor and purchaser be the test of what are "materials . . . used in the erection . . . of a building." Pub. Sts. c. 191, § 1. Mr. Justice Barker and myself, however, are disposed to think that the

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words of the act are to be taken in a less artificial sense, and that the true test is structural connection with the building, which would lead us to the same result as the majority.

Exceptions overruled.

COMMONWEALTH *vs.* JEROME W. ELLIS.

Suffolk. December 6, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Municipal Ordinance — Ultra Vires — Constitutional Law — State License.

The city council of Boston may lawfully forbid public selling in the streets; and an ordinance of the city which provides that no person shall sell, in any street or from any building, any goods or article to any person on the street, except in accordance with a permit from the superintendent of streets, is reasonable, constitutional, and valid; and the fact that the party complained of has a license as a pedler from the Commonwealth is immaterial.

COMPLAINT to the Municipal Court of the City of Boston, alleging that the defendant, on May 9, 1892, sold flowers in a public street of Boston without a permit from the superintendent of streets, in violation of the revised ordinance of that city. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows.

The complaint was brought under chapter 43, section 35, of the Revised Ordinances of the City of Boston of 1892, which provides that "No person shall, except in accordance with a permit from the superintendent of streets, in any street or from any building, sell any goods or article to any person on the street," etc. It was admitted by the defendant that he had done the acts complained of, and that he had no permit from the superintendent of streets. It appeared that the defendant had served as a soldier in the war of the Rebellion, and had a license issued by the Secretary of the Commonwealth under the St. of 1889, c. 457, "to go about as a hawker, pedler, or petty chapman, . . . and to expose for sale any goods, wares, or merchandise not prohibited by section 3 of chapter 68 of the Public Statutes."

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The defendant requested the court to rule as follows:

"1. The section of the ordinance in question is invalid, it being unjust, unreasonable, partial, and in restraint of trade. 2. The section is void, because it prohibits, not regulates trade; and in that it discriminates between people engaged in the same trade and calling, and is against public policy. 3. The ordinance or section is *ultra vires*, is inconsistent with and contrary to the statutes of the Commonwealth, and is unconstitutional."

No other rulings were requested. The judge declined so to rule, and directed the jury to return a verdict of guilty. The defendant alleged exceptions.

The case was submitted on briefs to all the judges.

P. O'Loughlin, for the defendant.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

HOLMES, J. We must assume that the defendant was guilty of a breach of the Boston city ordinance against selling in the streets. Rev. Ord. 1892, c. 43, § 35. The only question brought before us by the exceptions is whether the ordinance is valid. It must be construed in a rational way. See *Commonwealth* v. *Plaisted*, 148 Mass. 375, 382. Of course it does not mean that two persons walking together on a highway cannot make a bargain in their private conversation, and execute it on the spot. The sales referred to are sales in pursuance of an offer to the public, — sales in the course of a business generally conducted at a standstill, or at least with frequent stops, and tending to collect a crowd. Formerly the prohibition was confined to standing in the street for the sale of any article. Rev. Ord. 1885, c. 28, § 44. Probably the change was made to avoid nice questions as to what was standing, such as were raised in *Commonwealth* v. *Elliott*, 121 Mass. 367, but the object is the same, as appears also from the context. *Commonwealth* v. *McCafferty*, 145 Mass. 384, 385.

Any one who has observed the obstruction to travel and the general inconvenience which are caused by a stationary object in our crowded and narrow streets, would be slow to declare unreasonable a prohibition intended to prevent that inconvenience. We are of opinion, both on principle and on authority, that for this purpose the city council lawfully may forbid public

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selling in the streets. *Nightingale, petitioner*, 11 Pick. 168, 171. *Commonwealth* v. *Brooks*, 109 Mass. 355, 358. *Commonwealth* v. *Elliott*, 121 Mass. 367. *Commonwealth* v. *McCafferty*, 145 Mass. 384. 1 Dillon, Mun. Corp. (4th ed.) §§ 387, 393 *et seq.* This being so, the ordinance is none the worse for the exception in case of a permit from the superintendent of streets. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 382. *Quincy* v. *Kennard*, 151 Mass. 563. *Commonwealth* v. *Page*, 155 Mass. 227. *Commonwealth* v. *Parks*, 155 Mass. 531, 532. The fact that the defendant had a license as a pedler from the Commonwealth is not material on these exceptions. But the license did not authorize him to violate the ordinances of the city. *Commonwealth* v. *Fenton*, 139 Mass. 195. *Commonwealth* v. *Lagorio*, 141 Mass. 81. In the opinion of a majority of the court, the exceptions must be overruled. *Exceptions overruled.*

ALBERT SARGENT & others *vs.* SUPREME LODGE OF THE KNIGHTS OF HONOR & others.

Suffolk. December 6, 1892. — April 3, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Beneficiary Association — "Dependent" — Fraud — Change of Designation.

A benefit order was incorporated in Kentucky for the purpose, among others, of establishing a benefit fund, out of which, on the death of a member of the order, a certain amount might be paid "to his family or as he may direct." This fund was formed and maintained by assessments on the members, each of whom was entitled to a benefit certificate, containing the promise of the corporation to make payment to the person designated by him as beneficiary, which promise was made on condition that the member should comply, not only with all the existing laws of the order, but also with such as might afterwards be enacted. S. became a member of the order, designating as his beneficiary a person who was his creditor, and received a benefit certificate payable to the beneficiary so designated. The order was afterwards re-incorporated in Missouri by a new charter, which limited the persons who might receive payments out of the benefit fund to the family and dependents of members; and a law or resolution was passed by the order, requiring all members who held certificates in which persons other than members of the holders' families or their dependents were named as beneficiaries to surrender their certificates, in order that new certificates might

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be issued to them which should be payable to persons of the classes described in the new charter. S. thereupon represented that the person originally designated as his beneficiary was a dependent, and he was allowed to retain his certificate unaltered. This representation was false, but was made through mistake and was not fraudulent S. continued to pay all dues and assessments, and died a member of the order in good standing. The laws governing the order when S. became a member provided that, in the event of the death of all the beneficiaries selected by a member before such member's death, the benefit should be paid to his heirs; and the laws governing the order when S. died provided that, in the same event, the benefit should be paid to his widow and children, and if there was neither widow nor child, then to his heirs. At no time, however, did the laws of the order provide in terms for a case in which there was a failure of beneficiaries owing to the invalidity of the designation. S. left next of kin, but no widow or child. *Held*, upon a bill in equity brought by the next of kin of S. to secure the proceeds of his certificate against the order and the person named in the certificate as beneficiary, that the company could not resist payment on the ground that the designation of the beneficiary was invalid. *Held*, *also*, that the person named in the certificate, having been neither a member of the family of the deceased nor a dependent, was not entitled to the money, and that by a just and liberal construction of the laws of the order the next of kin or heirs were so entitled.

BILL IN EQUITY, filed by Albert Sargent and others, being all the next of kin of Otis Sargent, against the Supreme Lodge of the Knights of Honor, a corporation established under the laws of the State of Missouri, A. O. Cullymore and others, trustees of Massachusetts Lodge No. 1226, a subordinate lodge of the order, and one Millie J. Blaisdell, for the purpose of securing the proceeds of a "benefit certificate" issued by the Supreme Lodge to the said Otis Sargent. Trial before *Holmes*, J., who reported the case for the full court, in substance as follows, such decree to be made as justice might require.

The plaintiffs were the heirs and only next of kin of Otis Sargent. The defendant Millie J. Blaisdell was his executrix and residuary legatee, and the beneficiary named in the certificate. The Supreme Lodge of the Knights of Honor was originally incorporated by an act of the legislature of the State of Kentucky, passed on March 20, 1876. Subsequently, in the year 1884, it was again incorporated in the State of Missouri. On August 1, 1882, Otis Sargent became a member of a subordinate lodge of the order located in Massachusetts and existing by virtue of a charter duly granted by the Supreme Lodge, and he continued to be a member of the order until his death, on October 17, 1889.

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When Otis Sargent joined the order, the Supreme Lodge was a Kentucky corporation. The act of incorporation had declared what the objects of the corporation should be. One of them was "to promote benevolence and charity by establishing a Widows' and Orphans' Benefit Fund, from which, on the satisfactory evidence of the death of a member of the corporation who has complied with its lawful requirements, a sum not exceeding five thousand dollars ($5,000) shall be paid to his family, or as he may direct." The constitution governing the Supreme Lodge, adopted in May, 1882, a few months before Sargent was admitted to membership, declared the establishment of this fund to be one of the objects of the order, using precisely the same language used in the act of incorporation, except that, instead of a sum not exceeding $5,000, it provided that on the death of a member "a sum not exceeding two thousand dollars ($2,000) shall be paid to his family or as he may direct." In pursuance of this object the laws of the order provided for the payment by members of certain rates and assessments, which should constitute a fund to be known as the Widows' and Orphans' Benefit Fund. Persons eligible to membership in the order were admitted to its various degrees through the subordinate lodges, chartered by the Supreme Lodge and located in various places, upon a written application, the form of which was prescribed by the Supreme Lodge. Upon receiving "the third or degree of manhood" each member became entitled to share in the benefit of the Widows' and Orphans' Benefit Fund, and a "benefit certificate," made payable as the member had directed in his application, was issued to him by the Supreme Lodge. The laws of the order contained the following provisions in respect to such certificates (Law XXII.):

"Sect. 4. Each applicant shall direct in his application to whom he desires his death benefit paid, which shall be subject to such future disposal of the benefit as the member may thereafter direct, in accordance with the laws of this order, and such direction shall be entered in the benefit certificate.

"Sect. 5. A member may, at any time, while in good standing, surrender his benefit certificate, which, together with a fee of fifty cents, shall be forwarded by the Reporter of his Lodge under seal to the Supreme Reporter, who shall thereupon cancel

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the old certificate, and issue a new one in lieu thereof to such member, payable as he shall have directed. . . .

"Sect. 7. In the event of the death of all the beneficiaries selected by the member before the decease of such member, if he shall make no other or further disposition thereof, the benefit shall be paid to the heirs of the deceased member; and if no person or persons shall be entitled to receive such benefit by the laws of this order, it shall revert to the Widows' and Orphans' Benefit Fund."

An article of the constitution provided that the constitution and laws of the order might be amended at any regular meeting of the Supreme Lodge by a vote of two thirds of its members present. The application for membership signed by Otis Sargent contained the following agreement: "I, Otis Sargent, having made application to participate in the Widows' and Orphans' Benefit Fund of the Order of Knights of Honor, do hereby agree that compliance on my part with all the laws, regulations, and requirements now in force, or that may hereafter be enacted by said order, is the express condition upon which I am to be entitled to participate in the Widows' and Orphans' Benefit Fund." The benefit certificate subsequently issued to him upon this application stated that the agreement of the Supreme Lodge to pay $2,000 out of the Widows' and Orphans' Benefit Fund to the beneficiary named in the certificate was made "upon condition that said member complies with the laws, rules, and regulations now governing this order, or that may hereafter be enacted for its government."

In his application for membership Otis Sargent directed that his "Widows' and Orphans' Benefit" be paid to the defendant Millie J. Blaisdell, and in the benefit certificate she was accordingly named as the beneficiary, being therein described as "Millie J. Blaisdell (dependent)." The certificate was dated August 1, 1882. She was then, and continued to be until his death, a creditor of Otis Sargent, but she was never at any time dependent upon him.

In 1884 the Supreme Lodge of the Knights of Honor was reincorporated under the laws of Missouri, and obtained a new charter, which was narrower than the Kentucky charter, in that it limited the persons to whom, on the death of a member of the

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order, payments out of the Widows' and Orphans' Benefit Fund could be made, viz. to "such member or members of his family or person or persons dependent on him as he may direct or designate by name." Later in the same year, the constitution of the order was changed so as to conform to the new charter. After these changes had been made in the charter and constitution of the order, all new business was done under the Missouri charter, and assessments from all members of the order, whether they had become such under the Kentucky charter or under the Missouri charter, were collected under the latter. An absolute continuity, however, with the Kentucky corporation in respect to officers, funds, the numbering of assessments and certificates, and business generally, was preserved. Notice of the Missouri charter, and that the officers were acting under it, was sent to the subordinate lodges, but the notice contemplated the continued existence, temporarily at least, of the Kentucky charter. The subordinate lodges went on as before without taking out new charters from the Supreme Lodge.

The change in the charter and constitution in respect to beneficiaries of the Widows' and Orphans' Benefit Fund was not regarded as *ipso facto* invalidating designations made in benefit certificates which had been issued under the Kentucky charter, merely because the beneficiaries designated were neither members of the holder's family nor dependents. It was not understood or intended by any one to have such an effect. In 1887, however, while the constitution of 1884 was in force, a resolution was adopted by the Supreme Lodge, requiring that all members of the order holding certificates which showed that others than relatives or dependents were named as beneficiaries therein should be notified by the Supreme Dictator to return said certificates for change before September 1, 1887, and that, in case of failure so to do, no assessment should be received from the member, and that he should stand suspended. Otis Sargent received notice of this resolution, and thereupon made an affidavit that Millie J. Blaisdell was a dependent, and retained his certificate unaltered. This affidavit was not true, but there was no evidence other than its untruth that it was fraudulent, and Millie J. Blaisdell testified to a conversation with an officer of the subordinate lodge, with whom Sargent had dealt in the mat-

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ter, which tended to show that the local lodge had notice from Sargent of the actual state of facts. The justice who heard the case found as a fact that the affidavit was not fraudulent.

In May, 1889, a short time before Otis Sargent's death, a new constitution of the order was adopted. It provided, among other things in respect to benefit certificates and beneficiaries, that no will should be permitted "to control the appointment or distribution of, or rights of any person to, any benefit payable by this order" (Article IX. § 1). Article IX. § 4, provided that a member desiring to change his beneficiary might at any time surrender his old certificate, and that it should thereupon be cancelled and a new one in lieu thereof should be issued to such member, "payable as he shall have directed, within the limitations prescribed by the laws of the order." Article IX. § 6, was as follows: "*Death of Beneficiaries.* In the event of the death of all the beneficiaries designated by the member before the decease of such member, if he shall not have procured another benefit certificate designating other beneficiaries in accordance with the requirements of § 4 of this article, the benefit shall be paid to the widow and children of the deceased member; if no widow, to his children; if no children, to his widow; and if neither widow nor child, then to his heirs. And if no person or persons be entitled by the laws of the order to receive such benefit, it shall then revert to the Widows' and Orphans' Benefit Fund." But the laws of the order contained no provision applicable in its terms to a case in which a member had, through mistake or inadvertence, designated as his beneficiary some one not within those classes of persons whom the constitution adopted under the Missouri charter permitted to be so designated.

Otis Sargent died a member of the order in good standing, having paid all dues and assessments, and satisfactory proof of his death was furnished to the corporation. He left no widow and no children.

The bill alleged that the Supreme Lodge was about to pay over, through the trustees of the subordinate lodge of which Otis Sargent was a member, the money called for by his benefit certificate to the defendant Millie J. Blaisdell, and prayed that the defendant corporation and the trustees of the subordinate lodge might be enjoined from so paying over any part of the

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fund, and that they might be ordered to pay the whole of it to the plaintiffs. The defendant corporation denied that anything was due to anybody on the certificate in question; but no objection was taken to the bill as multifarious.

The judge found that the plaintiffs had failed to establish their right to the fund.

The case was argued at the bar in December, 1892, and afterwards was submitted on the briefs to all the judges.

V. J. Loring, for the plaintiffs.

E. Avery & A. E. Avery, for Millie J. Blaisdell.

J. H. Butler, for the Supreme Lodge of the Knights of Honor.

ALLEN, J. 1. The defendant company cannot resist payment on the ground that the designation of the beneficiary is invalid. Sargent, the holder of the certificate, had no design of defrauding the company. The designation was certainly valid when originally made, whether Miss Blaisdell was a dependent or not. It must be assumed that the company intended in any event to pay the stipulated amount to somebody. By a just and liberal construction of Law XXII. § 7, of the order, (Laws of 1882,) when the designated beneficiaries fail, the benefit is to be paid to the heirs of the deceased. And in the same contingency, the heirs are also entitled under the constitution of 1889, Article IX. § 6; the deceased leaving no widow nor child.

2. The only other question is whether the payment should be made to the claimant Blaisdell, or to the heirs. The original application directed that the certificate be made payable "to Millie J. Blaisdell, Boston, Mass." The certificate was made payable "to Millie J. Blaisdell (dependent)." Both application and certificate recognized that changes might be made in the laws and regulations by which the holder of the certificate would be bound. The original charter of the company provided that the benefit money "shall be paid to his family, or as he may direct." The constitution of 1882 contains a similar provision. Under those provisions, Millie J. Blaisdell, or any other person, might be designated as a beneficiary. But that constitution contained a provision to the effect that it might be amended; and in 1884 it was in fact amended, to conform to a new charter obtained in Missouri, and the payment of the benefit fund was limited to members of the holder's family, and persons de-

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pendent on him. A resolution was adopted in 1887 to require conformity to the new provision. Notice was sent to Sargent, and he made an affidavit that Miss Blaisdell was a dependent, and retained his certificate unaltered. The certificate, as already stated, described her as dependent. Henceforth, if not before, the designation of Miss Blaisdell as beneficiary stood only upon the footing that she was a dependent. The company not only passed a resolution, but took active measures to require and secure conformity to its new rule. Sargent did not resist this, but ostensibly brought himself within it, by swearing that she was a dependent. In point of fact she was not a dependent, and therefore is not entitled as such. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314. She had no vested right under the original designation. It was open to Sargent to change it at any time, with the consent of the company. *Marsh* v. *American Legion of Honor*, 149 Mass. 512. *Anthony* v. *Massachusetts Benefit Association*, *ante*, 322. If originally she might have maintained a claim simply as the person designated, without reference to the question whether she was a dependent, that state of things did not continue after he expressly put her upon the footing of a dependent, under the requirement of conformity to the new rule.

The result, in the opinion of a majority of the court, is, that the plaintiffs as heirs of Sargent are entitled to the money.

Decree for the plaintiffs.

GEORGE F. PROCTOR & others *vs.* JONATHAN STONE & others.

Suffolk. January 10, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Repair of Highway — Raising of Grade — Damage to Abutter — Liability of Agents of Town.

Persons employed by a town to make repairs in a highway which involve a change in its grade are not liable to an owner of abutting land damaged thereby, provided they act within the scope of their authority under a vote of the town, and the town itself has power to make such repairs.

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TORT, to recover damages for injuries alleged to have been caused to land of the plaintiffs by the defendants in raising the grade of a public highway in the town of Revere. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, upon agreed facts, in substance as follows. The defendants justified their acts on the ground that whatever they did was done by them in behalf and as the agents of the town, thereunto duly authorized.

On November 13, 1888, at a town meeting of the town of Revere, the defendants, Jonathan Stone, William H. Derby, and Seth Weston, were appointed a committee "to consider the matter of paving a portion of Broadway on the southeast side, from where the paving now ends to the car stable, provided the Lynn and Boston Horse Railroad Company will put their tracks in the centre of the street and pave between said tracks"; and also "to estimate the cost of edgestones, gradings, etc., and report at the March meeting."

At a meeting of the selectmen of said town, held on February 23, 1889, on the petition of the Lynn and Boston Railroad Company, for a relocation of their tracks on said portion of said Broadway and elsewhere, the selectmen voted to grant such relocation, "beginning at Beach Street and extending their double track through Broadway and the centre of the street to Central Avenue, laying tracks down to present grade of street to a little below Pleasant Street, then gradually coming up till the track will be about eight inches above present grade, making it a proper grade, more or less, as it may require upon survey. . . . The railroad company to pave from fourteen to eighteen inches outside their track, on the northwest side of their track, and between the two tracks." The land of the plaintiffs on account of which they claimed damages is on the southeast side of that part of Broadway where the tracks were required to be raised about eight inches above the then existing grade.

At the meeting of said town, held March 4, 1889, the committee above named made their report as directed. The report stated that "the Lynn and Boston Horse Railroad Company, having asked for and been granted a location in the centre of Broadway, . . . with two tracks in the centre of the street, they to pave all between their tracks and the usual width outside

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their tracks on the northwest side," the committee had estimated the cost of the labor and materials required for the proposed work, and recommended that it be done. The report also stated in some detail the figures on which the committee based their estimate of the cost. Thereupon, the town voted, under a proper article in the warrant by which the meeting had been called, to accept the report of the so called paving committee, to raise the amount of money necessary to defray the estimated cost, partly by taxation and partly by loan, and "that the same committee do the paving work."

The railroad company proceeded to construct its tracks in conformity with the vote of the selectmen granting it a relocation, and after they were thus constructed the defendants, acting as the committee of the town under the vote above referred to, caused the street to be paved and repaired in the following manner: the grade of the paving was made to conform to that of the railroad tracks, — that is to say, the edgestone in front of the plaintiffs' land, on the southeast side of the way, was placed with its top on a level with the car tracks, and the paving was made to slope gradually from the level of the tracks in the middle of the street down towards the edgestone at the side, so that where it came in contact with the edgestone, in the gutter, it was six inches below the level of the tracks and an equal distance below the top of the edgestone. This was the proper and usual way to pave and repair the street under the circumstances above described, because in order to pave a street so that it shall be safe and convenient for public travel it is necessary that the paving shall be laid with but a slight slope from the middle or highest part of the street towards the sides. And therefore, in paving and repairing Broadway, in accordance with the vote of the town, it became necessary to raise the grade of the street on the southeast side, where the plaintiffs' land was situated. This was done, the grade being raised, at different points on the plaintiffs' line, four and a half, six and seven eighths, seven and three eighths, and eight and five eighths inches respectively, the average amount which the grade was raised being a little over six and one fourth inches. On the northwest side of the tracks in front of the plaintiffs' premises, the grade of the way was raised without paving, the average

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amount being a little less than ten inches. But on that side of the tracks some of the work of repairing the roadway was done by the defendants and some by the surveyor of highways, who also did the repairing and raising of the sidewalk on that side. The defendants made the repairs which they are stated to have made in good faith, believing they had ample authority. The repairs made were a public benefit, and the defendants received no compensation for their services.

W. F. Kimball, for the plaintiffs.

S. Z. Bowman & H. W. B. Cotton, for the defendants.

BARKER, J. The plaintiffs seek damages because the defendants have raised the surface of the street upon which their lands abut. The defendants justify as agents of the town, which is empowered by the Pub. Sts. c. 52, § 13, to intrust to committees the making or repair of roads, and if the defendants have done only what the town commissioned them to do they are not liable to the plaintiffs, unless the town itself was not justified in raising the surface of the street.

It was originally held that all damages occasioned by a change in the grade of a way were fully paid and satisfied at the time of its location. *Callender* v. *Marsh*, 1 Pick. 418. But now, owing to alterations made by statute, if any change of grade made either by the adjudication of a tribunal authorized to alter the way or to order specific repairs, or occasioned by work done in making or keeping it safe and convenient for travel, does damage to land situated on the way, the owner may have compensation. Pub. Sts. c. 49, §§ 14–16, 65, 68, 73, 79, 84–87; c. 52, §§ 15, 16. *Burr* v. *Leicester*, 121 Mass. 241. *Bemis* v. *Springfield*, 122 Mass. 110. *Sisson* v. *New Bedford*, 137 Mass. 255. *Sullivan* v. *Fall River*, 144 Mass. 579.

Changes of grade are of two general classes: one where a grade other than that which has before existed is prescribed by boards or officers who have jurisdiction to order alterations or specific repairs; the other where the change occurs, without an adjudication, in so repairing the way as to make or keep it safe and convenient, and to better adapt it for uses for which it had before been intended. The former is not in a strict sense a repair, but a permanent change or alteration, as when a road is lowered or raised to pass under or over a railroad, and is

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really a substitution of one way for another, although both are within the same location. As held in *Bemis* v. *Springfield*, 122 Mass. 116, such radical changes are not to be made in the discharge of their ordinary duties by highway surveyors, or other officials or agents charged merely with keeping roads in repair, but are ordered by county commissioners or municipal governments under statute powers which are exercised in formal proceedings prescribed by the statutes. In the case of county ways this jurisdiction is in the county commissioners, under the Pub. Sts. c. 49, §§ 1–12, although in cities concurrent jurisdiction is usually given to city governments. In the cases of town ways and of private ways authority to institute such proceedings is given by the Pub. Sts. c. 49, § 65, to selectmen and road commissioners. Neither the statutes nor the decisions have attempted to draw the line between changes of grade which are such radical alterations as to require an adjudication, and those which may properly be made in the prosecution of the work of ordinary repair. It is usually of no importance to have a line of distinction established; for in either case, if the change causes damage to lands situated on the way, a remedy is given in the one case by an assessment by the tribunal which orders the change, Pub. Sts. c. 49, §§ 14, 15, 68, and in the other by petition of the party aggrieved, brought within one year after the completion of the work. Pub. Sts. c. 52, § 15. If the plaintiffs here had prosecuted their statute remedy, their right to recover in one or the other of these modes, if their land was in fact damaged, would have been clear. But as they have seen fit to sue the individuals who did the work, they must show that the acts which have damaged their land were beyond the authority given by the town, or that the town itself acted without right.

The statement of facts shows that when the defendants began work there were two street railway tracks in the centre of the street, with the space between them and for some inches on one side paved and raised about eight inches above the rest of the street, which was unpaved. In this condition the way was not safe and convenient for travel, since vehicles could not cross it without danger, and yet this was precisely the condition in which the town, when it directed the defendants to do the paving, anticipated that the street would be. It was necessary to

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repair it to fit it for travel, and the facts state that the committee repaired it in a manner proper and usual under such circumstances, and in so doing they did only what they were expected and directed by the town to do. But as the agreed facts state that the street was a public highway, and show no adjudication or order for such a change of grade as is contemplated by the statutes authorizing county commissioners or municipal governments to alter ways, or to order specific repairs, unless the changes made by the defendants were repairs which may be made without such an adjudication they were not within the power of the town to vote. It is not stated that the grade of the way had been previously fixed by any tribunal, and this is not to be inferred. In the absence of an established grade, the town by its highway surveyors, or by any agents whom it saw fit to employ, could make such reasonable changes in the surface of the street as were necessary to make it safe and convenient for the usual travel. It was within its power so to repair the street as to adapt it to the uses for which it had before been intended. The granting of the relocation to the street railway company seems to have been within the power of the selectmen. The width of the street is not given, but before the relocation there were two street railway tracks, which were so relocated as to occupy its centre. It cannot be said, as matter of law, that a relocation which directed these tracks when changed to the centre of the street to be raised eight or ten inches above their former grade was in excess of the power conferred by the Pub. Sts. c. 113, § 22, authorizing selectmen to alter the location and position of such tracks. Roads are often crowned to that height.

In our opinion, the whole change was not such a radical alteration of the way as to be beyond the limit of proper repairs. The street had before been used both for ordinary travel and for street cars, and it is agreed that the changes were a public benefit. If they in any way injured the plaintiffs' land, they had a remedy by petition to the selectmen, under the Pub. Sts. c. 52, § 15, and we see no reason why they should be allowed to recover of the defendants, who were servants of the town acting within the scope of their authority in making repairs which the town had power to make. See *Kennison* v. *Beverly*,

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146 Mass. 467, 469. *Allen* v. *Gardner*, 147 Mass. 452. *White* v. *Foxborough*, 151 Mass. 28, 42. *Collins* v. *Waltham*, 151 Mass. 196. *Woodbury* v. *Beverly*, 153 Mass. 245.

Judgment affirmed.

LYNN GAS AND ELECTRIC COMPANY *vs.* MERIDEN FIRE INSURANCE COMPANY & others.

Essex. January 17, 18, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Fire Insurance — "Loss or Damage by Fire" — Proximate Cause of Loss.

A building and machinery used for generating electricity for electric lighting were insured against loss or damage by fire, and the jury found that the fire caused a "short circuit" of the electric current, which resulted in great damage to the machinery in a part of the building not reached by the fire. *Held*, that the injury to the machinery caused in this way was a "loss or damage by fire," within the meaning of the policy.

CONTRACT, against several insurance companies, upon concurrent policies of the Massachusetts standard form, insuring the building and machinery of the plaintiff against loss or damage by fire. The several suits were tried together, and, by agreement of the parties, the exceptions and record were printed in one action only, the other suits standing continued to await and abide by the decision of this court on the exceptions. At the trial, before *Hammond*, J., it appeared that within the period for which the policies were written a fire occurred in the wire tower, so called, of the plaintiff's building, through which the wires for electric lighting were carried from the building, which fire was speedily extinguished, without contact with other parts of the building and contents, and with slight damage to the tower or its contents; that at about the same time, and in a part of the building remote from the fire and untouched thereby, there occurred a disruption by centrifugal force of the fly-wheel of the engine and of certain pulleys connected therewith, by which disruption the plaintiff's building and machinery were damaged to

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a large amount. The theory of the plaintiff, connecting the disruption of the machinery with the fire in the tower, as stated by the presiding justice in his charge to the jury, was as follows:

"The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused a greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed; — in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage. The plaintiff contends that the short circuit was effected by the fire, either by means of the heating of the air between the horns of these lightning arresters, or by the heating of the horns themselves, so that they came nearer, or by the action of the flame itself acting as a conductor between the two horns, or by the lodging between the two horns of partially consumed wood in the nature of charcoal; — that either by one or by all of these causes, of course it is impossible to say which, this short-circuiting was effected."

The defendants introduced evidence tending to show that the slipping of a belt was the cause both of the fire in the tower and of the disruption of the machinery, and that a defective pulley might have contributed to cause the disaster.

At the conclusion of all the evidence, the defendants asked for the following instructions, with others, to the jury:

"1. The defendants are not liable, under their policies, for damage by disruption of machinery, unless fire was the immediately operating cause of such disruption.

"2. If the action of fire in the tower of the plaintiff's build-

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ing was inadequate to produce the disruption without the intervention of some other and nearer cause, then the fire was not the proximate cause of such disruption, and the defendants are not liable therefor.

"3. The defendants do not insure the condition or working of the plaintiff's machinery. If the disruption of machinery and wreck of building would not have occurred but for some defect in the plaintiff's machinery, or some failure of such machinery to perform its office, such defect or failure not being occasioned by the fire, such defect or failure was the immediate cause of the damage, and the defendants are not liable therefor.

"4. Damage by disruption, independently of fire, is not a damage for which underwriters are liable under policies against damage by fire. If the damage by disruption for which the plaintiff claims was not occasioned by the direct action of fire, but was a consequence of defective machinery, or of neglect of the engine by a servant of the plaintiff, such defect or neglect was in law the proximate cause of such damage, and the defendants are not liable therefor."

The presiding justice, however, refused to give these instructions; and, after stating the theories advanced by the plaintiff and defendants, instructed the jury, so far as is material to the present case, as follows:

"I instruct you as the law of this case, that if you are satisfied that by action of the fire this short-circuiting was effected in the tower, and that the short-circuiting in the tower was the cause of the crash below, the loss is a loss or damage by fire within the meaning of the policy, and that it is not necessary that you should be satisfied that anything below was burning. If you are satisfied that the short-circuiting was caused by the fire in the tower, and would not have existed but for that fire, whether it be caused by flame, by the interposition of partially consumed particles of wood falling from the burning substance, by the heated air, or by the heating of the lightning arresters, that is, if the short circuit occurred and was caused by the action of the fire in any one of those ways and would not have occurred but for the fire, and that the short-circuiting in the tower was the cause of the crash below, then the crash below is to be attributed to fire within the meaning of the

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policy, and the damage is a damage by fire within the meaning of the policy, and that this is so although you may be satisfied that the pulleys were defective, and if not so would not have burst, but would have withstood the strain caused by the short-circuiting. And I rule, as matter of law, that if the damage was caused in that way it was a loss or damage by fire. . . . It is not necessary that you should be satisfied the defendants' theory is correct in order to find for the defendants, but you must be satisfied that the plaintiff's theory is correct in order to find for the plaintiff, and if you are in doubt as to which way the evidence preponderates on this claim of the plaintiff your verdict should be for the defendants. You are not here to ascertain the cause of that fire except to this extent, namely, whether the plaintiff's view of the cause is correct or not."

At the conclusion of the charge the presiding justice said to the counsel for the defendants, "You except to my instruction that if the jury find the plaintiff's theory correct they are to recover for the damage below?" to which the defendants' counsel replied, "The substantial difference we have on the law is that we claim that proximate causes intervened, for the operation of which we are not liable; and we desire to except to your honor's refusal to give the instructions asked by us in regard thereto, and to so much of your honor's charge as is inconsistent therewith."

The jury found for the plaintiff for the full damage arising from the disruption of the machinery, and the defendants alleged exceptions to the refusal of the court to give the four instructions above set forth, and to such parts of the instructions given as were inconsistent with said four requests.

S. Lincoln & J. D. Bryant, for the defendants.

W. H. Niles, for the plaintiff.

KNOWLTON, J. The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was

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such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed; — in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage." The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by a flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire," within the meaning of the policy.

The subject matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed

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by the maxim, *In jure non remota causa sed proxima spectatur*, relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necesarily to be chosen. *Freeman* v. *Mercantile Accident Association*, 156 Mass. 351. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases. *McDonald* v. *Snelling*, 14 Allen, 290. *Perley* v. *Eastern Railroad*, 98 Mass. 414, 419. *Gibney* v. *State*, 137 N. Y. 529. In *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, 474, Mr. Justice Strong, who also wrote the opinions in *Insurance Co.* v. *Transportation Co.* 12 Wall. 194, and in *Western Massachusetts Ins. Co.* v. *Transportation Co.* 12 Wall. 201, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance.

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Under our statute creating a liability for damages received from defects in highways, it is held that the general rule is so far modified that there can be no recovery unless the defect is the sole cause of the accident; but this doctrine rests on the construction of the statute. *Tisdale* v. *Norton*, 8 Met. 388. *Marble* v. *Worcester*, 4 Gray, 395. *Jenks* v. *Wilbraham*, 11 Gray, 142. *McDonald* v. *Snelling*, 14 Allen, 290. *Babson* v. *Rockport*, 101 Mass. 93.

In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. *Johnson* v. *Berkshire Ins. Co.* 4 Allen, 388. *Walker* v. *Maitland*, 5 B. & Ald. 171. *Waters* v. *Merchants' Louisville Ins. Co.* 11 Pet. 213. *Peters* v. *Warren Ins. Co.* 14 Pet. 99. *General Ins. Co.* v. *Sherwood*, 14 How. 351. *Insurance Co.* v. *Tweed*, 7 Wall. 44. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful; but on principle, and by the weight of authority in many well considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. *Scripture* v. *Lowell Ins. Co.* 10 Cush. 356. *New York & Boston Despatch Express Co.* v. *Traders & Mechanics'*

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Ins. Co. 132 Mass. 377. *St. John* v. *American Ins. Co.* 1 Kernan, 516. *General Ins. Co.* v. *Sherwood*, 14 How. 351. *Insurance Co.* v. *Tweed*, 7 Wall. 44. *Waters* v. *Merchants' Louisville Ins. Co.* 11 Pet. 213, 225. *Livie* v. *Janson*, 12 East, 648. *Ionides* v. *Universal Ins. Co.* 14 C. B. (N. S.) 259. *Transatlantic Ins. Co.* v. *Dorsey*, 56 Md. 70. *United Ins. Co.* v. *Foote*, 22 Ohio St. 340.

In the present case, the electricity was one of the forces of nature, — a passive agent working under natural laws, — whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words "direct and proximate cause," as interpreted by the best authorities. The instructions to the jury were full, clear, and correct, and the defendants' requests for instructions were rightly refused.

Exceptions overruled.

JAMES B. CASE & others *vs.* WILLIAM MINOT, JR. & others.

Suffolk. January 19, 20, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Landlord and Tenant — Implied Grant — Nuisance — Parties to a Suit in Equity — Amendment — Damages.

The defendants were the owners of a large building, used for business purposes, extending north and south between two parallel streets, and having entrances and windows on both. The plaintiffs, a firm of commission merchants, were the lessees of the second, third, fourth, and fifth floors of the east half of said building, each floor being lighted by windows in the ends, and by four windows in the east side, about midway between the two streets, opening into a rectangular light and air space or well twenty-seven and one half feet long by six and one half

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feet wide on the defendants' land, which space had been made by setting back the wall of the building from the east side line of the lot; and owing to the existence of a similar set-back in the wall of the adjoining building, the distance from said side windows to the opposite wall was about seventeen feet. Each side window had two iron shutters, which opened out into the open space and swung back against the wall. The plaintiffs used that part of the second floor opposite the side windows for the exhibition and sale of goods. The lease contained no mention of the open space, and no covenants whatever on the part of the lessors; but, in order that the plaintiffs might have the full enjoyment of the premises as leased, it was necessary that they should have the full and undisturbed use of the side windows for light and air, and of the open space for opening and closing the shutters. Some months before the expiration of the plaintiffs' lease, the defendants leased the whole building, subject to two unexpired leases, one of which was the plaintiffs', to J. and J., giving them immediate possession of the basement with permission to erect therein a large electric light plant and to build a sufficient chimney in connection therewith. J. and J. at once proceeded to build said plant, and erected large wrought-iron pipes or chimneys in the open space above described. The noise and dust caused by the work greatly annoyed and injured the plaintiffs in their business, the pipes or chimneys prevented to some extent the opening of the iron shutters, and obstructed the light so as to interfere materially with their business, and the construction and operation of the electric plant seriously affected the plaintiffs' ability to get insurance on their goods. *Held*, in a suit in equity brought to enjoin the defendants from disturbing the plaintiffs, or permitting them to be disturbed, in the quiet enjoyment of the demised premises, that there was an implied grant or demise of a right to the light and air passing through the open space or well. *Held, also*, that the acts of J. and J. constituted a nuisance or substantial interruption of the plaintiffs' right to quiet enjoyment; but *quære* whether they amounted to an eviction.

If a landlord authorizes his tenant to do on the demised premises wrongful acts which injure another, and this result is the natural and probable consequence of the acts so authorized, the landlord is liable therefor.

The plaintiffs were the lessees of the four upper floors of the east half of a building owned by the defendants as trustees. The first floor of the building and the basement were leased to B. and T., under a lease which was not to expire until a year later than the plaintiffs'. Some seven months before the expiration of the plaintiffs' lease, the defendants, in order to enable themselves to make a lease of the whole building to J. and J. and give them possession of the basement, bargained with B. and T. to vacate the basement and accept other rooms in place of it, and to permit the enlargement of the chimney serving the engine-room. This agreement was put in writing, and, besides other considerations therefor connected with the use of the premises, it was stipulated that $10,000 should be paid to B. and T. in cash. On the same day the defendants executed a lease to J. and J. of the whole building then occupied in part by the plaintiffs and in part by B. and T., which lease expressly provided that the lessees took subject to the lease to B. and T. as modified by their said agreement, and to the lease to the plaintiffs. It also provided as follows: "Permission is granted for the lessees to put into the basement of the building boilers, dynamos, and other appurtenances sufficient to supply power light, heat, etc. to the neighboring buildings occupied by them, and to build a chimney of adequate size in connection therewith." A few days later J. and J. went into possession and proceeded to put in said electrical works, by the con-

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struction of which the plaintiffs were injured. One of the defendants and their active trustee testified, in a suit in equity to enjoin the defendants from disturbing the plaintiffs or permitting them to be disturbed, that he could do nothing to stop the work except to say to J. and J. that he would be glad to have anything done to prevent annoyance, and in their answer the defendants averred that J. and J. were "regarding the terms and provisions" of their lease. *Held*, that the defendants had authorized the doing of the acts complained of. KNOWLTON & MORTON, JJ. dissented from that part of the opinion holding the defendants legally responsible for the erection of the chimney by J. and J.

When the objection of want of parties is taken by plea or answer to a bill in equity, the defendant must give the names of the necessary parties, especially when they are peculiarly within his knowledge.

If an injunction cannot properly be granted on a bill in equity without the addition of parties defendant, the court, even in the absence of proper pleadings, will take notice of the fact, and direct the cause to stand over in order that the necessary parties may be added.

When a plaintiff brings a bill in equity for equitable relief to which he is then entitled, and a reason for denying such relief afterwards arises pending the suit, the bill will not, for this cause, be dismissed, but will be retained for the assessment of damages.

BILL IN EQUITY, filed on August 16, 1892, by the plaintiffs as lessees, to restrain and enjoin the defendants, their landlords, from disturbing them or suffering them to be disturbed in the quiet enjoyment of the demised premises.

The plaintiffs were copartners, doing business under the name of Case, Dudley, and Battelle. The defendants William Minot, Jr., and four others, were the trustees of the Boston Real Estate Trust, of which the said Minot was the actuary. The bill prayed that an injunction might be issued restraining the defendants from further causing, making, permitting, or suffering the continuance of the annoyances complained of during the remainder of the plaintiffs' lease, and from permitting or causing the continuance of a structure hereinafter described, in so far as it obstructed the admission of light and air, to which the plaintiffs said they were entitled. The court refused to grant a preliminary injunction, and ordered the defendants to make immediate answer. The defendants thereupon filed a demurrer and answer. In their answer the defendants, after admitting or denying the allegations of the plaintiffs' bill, proceeded to state "that on or about the twentieth day of May, A. D. 1892, they made a lease in writing of the entire premises and building, a part of which the plaintiffs occupy, to one Jordan and another, which lease was expressly made subject to all the rights of the plaintiffs in the premises, and which lease gave to the lessees therein named,

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subject as aforesaid, certain rights of repair, renewal, and remodelling; that said lease is now in full force; that, as defendants are advised, their lessees are regarding the terms and provisions thereof; and that the defendants are directing, controlling, or doing no work in and about the premises whatever." The demurrer having been overruled, the case was heard on the merits before *Bond*, J., who dismissed the bill, and, at the request of the plaintiffs, reported the case for the consideration of the full court, substantially as follows.

The defendants owned a building in Boston, bounded southerly on Bedford Street and northerly on Avon Street. The easterly line of the lot was straight, and the face of the wall of the building on that side was built upon the line of the lot, except about midway between the two streets, where the wall was set back from the line of the lot so as to leave a rectangular space about six and one half feet wide by twenty-seven and one half feet long, wholly on the defendants' land. The wall of the adjoining building, as it then stood, had in it a corresponding jog or set-back, so that the distance between the walls of the two buildings where both were set back was about seventeen feet. The plaintiffs occupied the second, third, fourth, and fifth stories of the east half of the building under a written lease, which expired on December 31, 1892. The premises leased to the plaintiffs extended the whole length of the building from Avon to Bedford Streets, and had an entrance on each street. This lease contained no mention of the open space above described, and no express covenants whatever on the part of the lessors. In it, however, the lessees covenanted, among other things, that they would not make or allow "any unlawful, improper, or offensive use" of the premises that should be "injurious to any person or property, or liable to endanger or affect any insurance on said premises, or to increase the premium thereof," and that they would "conform to such rules and regulations as" might "from time to time be established by the lessors for the general convenience and safety of the tenants in the building." The lease was dated December 6, 1890, and at that time the building was a business or commercial one. The rooms on the floors leased to the plaintiffs were lighted at each end by windows overlooking Bedford and Avon Streets respectively, and also on the east side by windows opening into the light and air space

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above referred to. There were four of these side windows on each floor, and they were furnished with iron shutters, two at each window, which opened out into the light and air space, and swung back against each other, or against the wall at the sides of the windows.

At the Bedford Street end of the second floor of the building, which was the first floor of the premises leased to the plaintiffs, were two offices, with sash partitions, which occupied that end for its whole width.

When the plaintiffs brought their bill they were, and for many years had been, commission merchants, doing an extensive business in the sale of goods consigned to them by various manufacturers, and they used the lowest floor of the premises leased to them, not only as a store-room, but as a sales-room. In making sales, it was necessary for them to have a well lighted place in which customers might examine goods, and the plaintiffs used that part of the second floor of the building directly in front of the side windows opening on the light and air space for that purpose. In order, therefore, that the plaintiffs might have the full enjoyment of the premises as they were when leased to them, it was necessary that they should have the full and undisturbed use of the side windows for light and air, and of the space without for opening and closing the iron shutters.

Underneath the premises leased to the plaintiffs were one floor and a basement which had been leased by the defendants to, and were occupied by, Bradford and Thomas, who also occupied the west half of the fourth and the west half of the fifth floor under the same lease, which had not expired on May 20, 1892, but was modified by an agreement in writing of that date. This agreement, entered into by Bradford and Thomas of the one part, and the defendants of the other part, provided that on or before June 3, 1892, Bradford and Thomas would vacate the basement, and accept in place thereof the two chambers then vacant on the west side of the building, in the second and third stories, and permit the enlargement of the chimney then serving the engine-room. In consideration therefor the trustees agreed to pay $10,000, to make certain improvements and repairs, to pay any advance in the rates of insurance caused thereby, and to give Bradford and Thomas a right to terminate their lease at any time upon sixty days' notice. This agreement was made

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by the defendants in order that they might be able to make a lease of the whole building and estate, subject to the unexpired leases above referred to, to Eben D. Jordan and Eben D. Jordan, Jr., and at the same time give the Jordans possession of the basement.

The lease to the Jordans contained among others the following stipulations: "The lessees take subject to the lease to Case, Dudley, and Battelle, and to the lease to Bradford and Thomas, and to the agreement dated this day between the lessors and said Bradford and Thomas, the obligations of which the lessees hereunder assume and agree to carry out, except that the lessors are to furnish the cash bonus of $10,000. . . . Permission is granted for the lessees to put into the basement of the building boilers, dynamos, and other appurtenances sufficient to supply power, light, heat, etc. to the neighboring buildings occupied by them, and to build a chimney of adequate size in connection therewith." The term of the lease was eight years and seven months from June 1, 1892, but the instrument was not recorded. After June 1, 1892, when the Jordans went into possession, the defendants did not occupy the premises, or have any control of them, except as landlords. They did not employ any one to do the work upon the premises complained of in the plaintiffs' bill, or direct or authorize the doing of such work, unless the contrary is held to appear, constructively and as matter of law, upon the facts reported.

On June 1, 1892, the Jordans began, by their servants and agents, to place in said basement boilers and other apparatus designed for an electric light plant of a capacity of 250 arc lights, as specified in their said lease, and to erect wrought-iron pipes or chimneys in the light and air space into which the plaintiffs' side windows opened. The work went on during the summer, and at the time of the hearing, September 15, 1892, these pipes had been entirely finished.

By the construction of said electric plant, with its pipes or chimneys, the plaintiffs were greatly annoyed and injured in their business, and in the quiet enjoyment of the premises leased to them, by reason of the noise and dust caused by the work; and the light from the side windows was "substantially obstructed" by the pipes or chimneys, "so as to materially interfere" with the plaintiffs' business. The pipes or chimneys

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obstructed the admission of light and air, not only by filling a large part of the open space, but also by interfering with the opening of the iron shutters. The extent of such interference was shown by means of a plan.

The report further stated that the work done by the Jordans had caused an increased expense to the plaintiffs in their insurance, to the extent of "mechanics' permits"; and that the operation of the electric plant introduced would prevent the plaintiffs from obtaining a proper amount of insurance on their goods, for the want of which the plaintiffs would not be able to carry on their business on the premises as before, and that such an amount of insurance as they could get must be obtained at an increased cost.

After the foregoing facts had appeared in evidence, it further appeared that the plaintiffs had complained to the defendants, by letter, of the annoyance caused by the alterations aforesaid, in answer to which the defendant Minot had written, among other things, that he would do what he could. In respect to what he had actually done, the defendant Minot, having been called as a witness for the defendants, testified on cross-examination as follows: "I did nothing, except to go down, or send down, I have forgotten which; I communicated with Jordan and Jordan, and informed them with respect to this letter, and informed them that I would be glad to have anything done to prevent annoyance. That was all I could do." When asked if he saw what Jordan and Jordan were doing, he answered: "I saw in this way, — I did not go into the premises; I saw from the street what was going on." The following question was then asked: "Whether or not you understand Jordan and Jordan are doing anything other or different than they are authorized to do under this lease?" To this question the defendants objected, and it was excluded, subject to the plaintiffs' exception.

The report concluded as follows: "I find that the complainants brought said bill in good faith, believing it to be their proper remedy. But on the pleadings and the facts herein reported, being of the opinion and ruling that the plaintiffs were not entitled to any relief, either by way of injunction or damages, against the defendants, I entered judgment dismissing said bill, and report the case for the determination of the Supreme

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Judicial Court; if the ruling was correct, the judgment is to be affirmed; if the plaintiffs are entitled to damages, the case is to be sent to a master for the assessment of the same; and if the plaintiffs are entitled to any other relief, the case is to be retained or remanded for further proceedings."

The case was argued at the bar in January, 1898, and afterwards was submitted on the briefs to all the judges, except *Holmes*, J.

W. H. Leonard & C. H. Hanson, for the plaintiffs.

F. Rackemann, (*F. V. Balch* with him,) for the defendants.

ALLEN, J. The court ruled that on the pleadings and facts reported the plaintiffs were not entitled to any relief, either by way of injunction or damages, against the defendants, and therefore dismissed the bill. The particular ground is not stated, but from the terms of the report and the course of the argument we are led to infer that it was thought that the plaintiffs should have sought their remedy against the Jordans alone, through whose immediate agency the acts complained of were done, and that the present defendants are not responsible therefor. However, we have to consider the whole case.

1. It could not properly be held on the facts reported, that, as matter of law, the plaintiffs were not entitled to any relief against anybody. It is true that the description of the premises demised to the plaintiffs contained no express mention of the well or open space for light and air, and the lease contained no express covenants on the part of the lessors. But the situation and habitual use of the demised premises were such as to warrant, if not to require, the finding of an implied grant of a right to light and air from the open space, or at least from that portion of it owned by the defendants. It is true that the doctrine of implied grants of easements or privileges connected with real estate is applied with some strictness in this Commonwealth; but in this case it might well be found, as it was found, that the right to light and air was necessary to the beneficial enjoyment of the demised premises. The open space was not accessible from the street. Its sole use, so far as the lessors were concerned, was for the benefit of the occupants of their building, and it must have been intended that the plaintiffs should have the benefit of it. There is no other reasonable view to be taken of the facts. The case of *Doyle* v. *Lord*, 64 N. Y. 432, much

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resembles the present, and fully sustains the plaintiffs' contention on this point; and the general doctrine that there is an implied grant of whatever is necessary to the beneficial enjoyment of the thing granted is familiar. *Salisbury* v. *Andrews*, 19 Pick. 250. *Thayer* v. *Payne*, 2 Cush. 327, 331. *Pettingill* v. *Porter*, 8 Allen, 1, 6, 7. *White* v. *Chapin*, 12 Allen, 516. *Oliver* v. *Pitman*, 98 Mass. 46, 50. *Buss* v. *Dyer*, 125 Mass. 287. *Hooper* v. *Farnsworth*, 128 Mass. 487. *Johnson* v. *Knapp*, 146 Mass. 70, and 150 Mass. 267. *Brande* v. *Grace*, 154 Mass. 210. Taylor, Land. & Ten. (8th ed.) § 161. 2 Washb. Real Prop. (5th ed.) 29, 30, 37, 38. Without undertaking to define what may, in all cases, be included as necessary, it is enough to say that, on the facts reported, light and air from this open space might well be found to be necessary.

That being so, the facts reported are sufficient to show, or at least to warrant, a finding of a nuisance, or a substantial interruption of the plaintiffs' right to quiet enjoyment of the premises; *Fuller* v. *Ruby*, 10 Gray, 285, 290; *Sanderson* v. *Mayor, &c. of Berwick-upon-Tweed*, 13 Q. B. D. 547; *Jenkins* v. *Jackson*, 40 Ch. D. 71; *Robinson* v. *Kilvert*, 41 Ch. D. 88, 97; Taylor, Land. & Ten. (8th ed.) §§ 305, 309, 380; though perhaps not of an eviction; as to which see *Royce* v. *Guggenheim*, 106 Mass. 201; *Bartlett* v. *Farrington*, 120 Mass. 284; *Brown* v. *Holyoke Water Power Co.* 152 Mass. 463; *Brande* v. *Grace*, 154 Mass. 210; *Upton* v. *Townend*, 17 C. B. 30.

2. Assuming that the plaintiffs had a right to relief against somebody, it could not properly be held on the facts reported that they were not so entitled as against these defendants. This is the point on which most stress has been laid in the argument for the defendants. A brief recital of facts may be made. The plaintiffs' lease would not expire till December 31, 1892. In it they covenanted to make no use of the premises that should be injurious to any person or property, or liable to affect any insurance on the premises or to increase the premium thereof, and to conform to such rules and regulations as might from time to time be established by the lessors for the general convenience and safety of the tenants in the building; but the lessors entered into no express covenants. At the time the plaintiffs took their lease, which covered the second, third,

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fourth, and fifth stories of the east half of the building, Bradford and Thomas held a lease of the store and basement under the plaintiffs, which would run for a year longer than the lease to the plaintiffs, and which contained provisions identical with or similar to those in the plaintiffs' lease; and they covenanted not to make any alterations or additions during their term without the written consent of the lessors. On the 20th of May, 1892, the defendants, in order to enable themselves to make another lease, which should include said basement, to the Jordans, and to give possession thereof to the Jordans, bargained with Bradford and Thomas to vacate the same and to accept other rooms in place thereof, and to permit the enlargement of the chimney then serving the engine-room; the expressed consideration therefor being ten thousand dollars, to be paid to Bradford and Thomas in cash, besides certain other considerations connected with the use of the premises. On the same day the defendants executed a lease to the Jordans of the whole premises then occupied in part by Bradford and Thomas and in part by the plaintiffs, with these provisions amongst others: "The lessees take subject to the lease to Case, Dudley, and Battelle [the plaintiffs], and to the lease to Bradford and Thomas, and to the agreement dated this day between the lessors and said Bradford and Thomas. . . . Permission is granted for the lessees to put into the basement of the building boilers, dynamos, and other appurtenances sufficient to supply power, light, heat, etc. to the neighboring buildings occupied by them, and to build a chimney of adequate size in connection therewith." The Jordans went into possession on June 1, 1892, and proceeded to put in electrical works under the permission contained in their lease. There is nothing in the facts reported to show that in putting in these works the Jordans made any more disturbance of, or interference with, the plaintiffs than was necessarily incident to the doing of such work, or that in any respect they exceeded the permission granted to them by the defendants. The contrary is to be assumed. Mr. Minot, one of the defendants and their active trustee, testified that he could do nothing to stop the work, except to say to the Jordans that he would be glad to have anything done to prevent annoyance. The defendants objected to his being asked if the Jordans were

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doing anything other than or different from what they were authorized to do under the lease, and the question was excluded. Moreover, in their answer the defendants aver that the Jordans "are regarding the terms and provisions" of their lease.

Upon these facts it might well have been found that the defendants sanctioned and authorized whatever the Jordans did, and were answerable for it. They gave express permission; and they did it for a consideration. They bought off Bradford and Thomas for the very purpose of letting the premises to the Jordans, with this permission. The effect was to injure the plaintiffs. This result was the natural and probable consequence of what the defendants permitted to be done. It was a result which they must have contemplated from the outset. A jury upon these facts would not only be well warranted in finding that the defendants were responsible to the plaintiffs, but that view seems to be most in accordance with the facts. The decision in the well considered case of *Upton* v. *Townend*, 17 C. B. 30, 66, 71, 72, is closely applicable on this point. See also *Lufkin* v. *Zane*, 157 Mass. 117; *Fish* v. *Dodge*, 4 Den. 311, 317.

3. The defendants raise the further objection that the Jordans are not parties to the suit, and that it became apparent during the trial that they were the persons actually causing and doing the things complained of by the plaintiffs. So far as this ground of defence is set up in the answer, it is found in the averment that the defendants made a lease "to one Jordan and another, which lease was expressly made subject to all the rights of the plaintiffs in the premises, and which lease gave to the lessees therein named, subject as aforesaid, certain rights of repair, renewal, and remodelling; that said lease is now in full force; that, as defendants are advised, their lessees are regarding the terms and provisions thereof; and that the defendants are directing, controlling, or doing no work in or about the premises whatever." This ground of defence seems to be stated in the answer rather by way of exoneration of the defendants than as pleading the want of parties. When the defendants say that they made a lease "to one Jordan and another," it cannot be supposed that they thereby meant to suggest that the plaintiffs must make "one Jordan and another" parties defendant. The

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objection of want of parties, when taken by plea or answer, should give the names of the necessary parties where this can be done, and especially where it is peculiarly within the knowledge of the defendants. Story, Eq. Pl. §§ 236, 238, 543. But, waiving the discussion of technicalities, let it be assumed that no injunction could properly be granted without making the Jordans parties. The only result is, that the court would, even in the absence of proper pleadings, take notice of the fact, and direct the cause to stand over, in order that the new parties might be added. *Schwoerer* v. *Boylston Market Association*, 99 Mass. 285, 295. Story, Eq. Pl. §§ 236, 238. 1 Dan. Ch. Pl. & Pr. (4th Am. ed.) 292. The bill was not dismissed upon this ground, but upon the ground that the plaintiffs were not entitled to any relief, either by way of injunction or damages, against the defendants. The Jordans might have been made parties by an amendment, and might be now if an injunction were still sought. But the time has passed when an injunction could properly be issued, and the only question remaining is whether relief by way of damages should be given. So far as this form of relief is concerned, the Jordans are not necessary parties. They have entered into no implied covenant for quiet enjoyment with the plaintiffs. If in any aspect the plaintiffs could maintain a claim for damages against them, certainly they are not joint contractors with the defendants, and if the defendants are liable in damages there is no rule requiring the Jordans to be joined in a suit to recover such damages. The objection of want of parties is therefore unavailing in the present posture of the case.

4. The only remaining question is whether relief should be granted against the defendants by way of damages. It was held in *Milkman* v. *Ordway*, 106 Mass. 232, that where a plaintiff in good faith brings a suit seeking equitable relief, supposing, and having reason to suppose, himself entitled to such equitable relief, even though at the time when the bill was brought he had no right to relief purely equitable, yet the court will afford relief by awarding compensation; *a fortiori*, if the reason for denying the purely equitable relief occurs pending the suit. In the present case, provided in other respects the plaintiffs make out their case, the only reason for not granting an injunction

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is that, pending the suit, the plaintiffs' lease has expired. The plaintiffs should not for this reason be turned out of court, but the bill should be retained for the assessment of damages. *Woodbury* v. *Marblehead Water Co.* 145 Mass. 509. *Brande* v. *Grace*, 154 Mass. 210. St. 1887, c. 383.

Case remanded for further proceedings.

Justices KNOWLTON and MORTON dissent from that part of the foregoing opinion which holds the defendants legally responsible for the erection of the chimney by Jordan and Jordan, for these reasons.

In their view the defendants are not shown to have had to do with the changes near the plaintiffs' premises, except as appears by their written contracts in regard to the property. They arranged with Bradford and Thomas so as to let Jordan and Jordan into possession much sooner than could have been done without the arrangement. They made a lease to Jordan and Jordan for eight years and seven months, and in the lease they gave permission to make the changes; but they expressly stated in the lease that "the lessees take subject to the lease to Case, Dudley, and Battelle," the plaintiffs. Without such permission Jordan and Jordan would have had no right as against the defendants to make the changes. With it they had and have a right as against the defendants. It cannot fairly be construed as authorizing the Jordans to create a nuisance, or to do anything that would interfere with the plaintiffs' rights as lessees. It amounted to a declaration on the part of the defendants that they gave no right as against the plaintiffs, and that Jordan and Jordan might make the changes after the expiration of the plaintiffs' lease, which then had less than eight months to run, but not before, unless they did it with the consent of the plaintiffs, or in such a way as not to affect the plaintiffs' legal rights.

It seems to the dissenting justices that with this construction full effect is given to the language of the contracts, in accordance with the intention of the parties, and that it is unjust to the defendants to charge them as having authorized the work to be done against the rights of the plaintiffs, and to make them pay damages for which, on the plaintiffs' theory, they can have no recovery against the real wrongdoers.

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ARTHUR H. HOWLAND & others *vs.* JOHN R. ROOKE.

Suffolk. January 24, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Equity — Appeal — Question of Fact.

On an appeal from the decree of a single justice in equity, the only question raised was one of fact, and the evidence tended so strongly to support the decree that the court was convinced that the appeal was frivolous. *Held*, that the prevailing party was entitled to double costs and interest at twelve per cent, and that the decree should be affirmed with such modifications as were rendered necessary by the lapse of time and the order for costs and interest.

BILL IN EQUITY, brought in the Superior Court by the plaintiffs as copartners, in order to obtain an accounting between themselves and the defendant, and to restrain the defendant from disposing of certain notes, and of certain bonds which he held as collateral security for the notes, until the final disposition of the suit.

The bill alleged that the defendant had contracted with the plaintiffs to furnish certain materials and to do certain work in connection with the construction of waterworks for the town of Maynard, and that the notes in question represented an amount which would have been due from the plaintiffs to the defendant under said contract had the work been properly done; that the notes were given to the defendant upon the express understanding that they were not given in payment of any debt admitted by the plaintiffs to be due, but were given for the defendant's accommodation; that the defendant had agreed to accept renewals of them until the work should have been accepted by the water commissioners of the town; and that the work never had been so accepted, but that nevertheless the plaintiffs had paid the defendant a large amount on account, and owed him nothing. The bill further stated that the defendant had given the plaintiffs notice that he intended to sell the bonds held as collateral security in order to pay the notes.

The answer denied that the notes had been given on such terms, and averred that they had been given in final and abso-

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lute settlement of a claim for a much larger amount, to recover which the defendant had brought an action, and this action he had dismissed as a part of his settlement with the plaintiffs. At the hearing in the Superior Court a large amount of documentary evidence was introduced, which consisted of the correspondence between the parties relative to the notes, the notes themselves, the letters of the defendant to his attorney directing the dismissal of the defendant's action at law, etc. The other evidence was the oral testimony of the defendant and the plaintiff Howland, in respect to the character and circumstances of the transaction in which the notes in question were given. The court made a decree adjudging that the plaintiffs owed the defendant $2,690.96 on the notes, and ordering that this amount be paid out of a fund which the plaintiffs had deposited in the hands of the clerk of the court, and the plaintiffs appealed.

E. Avery & G. M. Hobbs, for the plaintiffs.

S. H. Dudley, for the defendant.

BARKER, J. The single question raised by the plaintiffs is whether, upon the evidence, a compromise settlement made by the parties on October 29, 1890, was final and absolute, or conditional. One of the plaintiffs and the defendant were the only witnesses examined, and their testimony was contradictory. But they both testified that, at the time of the settlement, the plaintiffs gave the defendant a negotiable promissory note with collateral security for the amount agreed upon; that when the note became due a portion of it was paid and the balance was renewed; and that payments of different amounts were subsequently made from time to time. The exhibits show no trace of any condition annexed to the settlement, although they indicate that both parties afterwards claimed that some items had not been considered in arriving at the compromise. Upon the whole, the documentary evidence bears strongly in favor of the defendant, who, at the time of the settlement, dismissed an action previously brought to recover the claims which he compromised. In addition, the plaintiff, who testified in this case that the settlement was conditional, admitted, upon cross-examination, that he had, on the day after it was made, testified in another case that he had paid the defendant in full all that he owed him by a payment equivalent to cash, giving him the bonds which the

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plaintiffs seek to redeem as collateral for a note which it was arranged should be discounted so that he could get the money. The weight of the evidence is not only so strongly in favor of the defendant as to support the decree, but also to convince us that the plaintiffs' appeal is frivolous. The case calls for the imposition of double costs, and interest at the rate of twelve per cent by the year from the time when the appeal was taken, and the decree is to be affirmed with such modifications as are rendered necessary by the lapse of time and the order for double costs and interest. See St. 1883, c. 223, § 15. The modifications made necessary by this decision will be made in the Superior Court.

So ordered.

MARGARET DEBINSON *vs.* WILLIAM H. H. EMMONS.

Suffolk. January 25, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Donatio Mortis Causa — Delivery — Appeal from Equity Decree.

Upon an appeal in equity from a decree of a justice of the Superior Court, where there is no statement of rulings made or of facts found, but where the evidence taken under the rule is reported, the decree will stand, unless, giving due weight to the decision of the court below so far as findings of facts are involved, it clearly appears to be erroneous.

Where in a suit in equity there was evidence tending to show that the donor upon her death bed, when almost *in extremis*, gave to the donee, as a present gift, two trunks and their contents, which were at the foot of the bed upon which she lay, at the same time handing to the donee the keys, and declaring that the trunks and all in them were the donee's, and that the donor knew that she had certain bank-books in the trunks at the time of the gift, and referred at the time of the gift to her money and to the manner in which she had obtained it, it cannot be said that the presiding justice was not justified in finding that there was a present transfer of the actual possession, dominion and property of the trunks and their contents, including the bank-books.

BILL IN EQUITY, brought to secure possession of three bank-books alleged to have been given to the plaintiff as a gift *mortis causa* by her aunt, Julia Murphy, and to have been wrongfully taken and detained by the defendant, who was the administrator of the estate of Julia Murphy. The case was heard in the

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Superior Court, and a final decree was entered for the plaintiff, from which the defendant appealed. The material facts appear in the opinion.

J. L. Bates, for the defendant.

S. J. Thomas & A. P. Worthen, for the plaintiff.

BARKER, J. As the case was heard upon its merits by a justice of the Superior Court and is here only by appeal, with no statement of rulings made or of facts found, but with the evidence taken under the rule, the question is whether, giving due weight to the decision of the court below so far as findings of fact are involved, the decree clearly appears to be erroneous. If not, it is to stand. *Reed* v. *Reed*, 114 Mass. 372. *Montgomery* v. *Pickering*, 116 Mass. 227, 230. *Allen* v. *Allen*, 117 Mass. 27, 29. *Andrews* v. *Gilman*, 122 Mass. 471. *Newton* v. *Baker*, 125 Mass. 30, 33. *Holmes* v. *First National Bank of Fall River*, 126 Mass. 353, 358. *Boston Music Hall Association* v. *Cory*, 129 Mass. 435. *Rau* v. *Von Zedlitz*, 132 Mass. 164. *Chase* v. *Hubbard*, 153 Mass. 91. The doctrine that gifts *mortis causa* take their effect from delivery, and require actual delivery or its equivalent, what is commonly spoken of as symbolical or constructive delivery not being sufficient, is well settled, (see *McGrath* v. *Reynolds*, 116 Mass. 566, and cases cited, and *Fearing* v. *Jones*, 149 Mass. 12,) and we assume that it was applied by the justice who heard the evidence. It is not contended that any required element of a valid gift *mortis causa* is wanting except actual delivery. The question therefore is whether a finding of an actual delivery of the bank-books was clearly erroneous upon the evidence.

These cases are always more or less suspicious, and the reading of the reported evidence in this case leads to a surmise that possibly there was no such scene as that related by the plaintiff and her witnesses. But all the witnesses were produced before the justice who heard the case, and were cross-examined at great length and on different days. If upon the whole the presiding justice had not deemed them worthy of credit he could not have so found the facts as to authorize a decree for the plaintiff. Assuming that their story is substantially true, there is ample evidence to support a finding of an actual delivery of the books. As stated in *Coleman* v. *Parker*, 114 Mass. 30, 33, the "term

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'delivery' is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient and to be carried away." The same opinion contains further statements, the close resemblance to which of the evidence in the present case is remarkable, if not disquieting: "We have no doubt that a trunk with its contents might be effectually given and delivered, in such a case, by a delivery of the key, not as a symbolical delivery of the property, but because it is the means of obtaining possession. *Ward* v. *Turner*, 2 Ves. Sen. 431, 443. If the key in this case had been placed in the hands of the witness, the donor relinquishing all dominion and control over it, and parting with it absolutely, or if by direction of the donor the witness had taken it into her possession and exclusive control, there would have been a sufficient delivery to make out a full title in the plaintiff. *Wing* v. *Merchant*, 57 Maine, 383. *Dole* v. *Lincoln*, 31 Maine, 422." The resemblance of the facts testified to by the plaintiff and her witnesses with those supposed in the dictum quoted is remarkably close, but this feature of the case must have been duly considered by the presiding justice, and he must have been satisfied that the testimony was not a creation to fit a precedent. Here the substance of the testimony of the plaintiff and of two other witnesses that the donor upon her death bed in the room where the donor was, if not a mere visitor, at most a joint occupant with the donee, and when almost *in extremis* gave to the plaintiff as a present gift two trunks and their contents which were at the foot of the bed upon which she lay, at the same time handing her the keys and declaring to the donee that the trunks and all in them were hers. The testimony of the different witnesses is not so identical in thought or expression as to raise a belief that it is the recollection of a narrative committed to memory rather than of a scene which the witnesses observed, and in the testimony of each witness are all the essentials of a present gift, transferring not only the present right of property but the present possession of it and present dominion over it. "'Maggie, here is my keys, and there is everything in my trunks. . . . Now, Maggie, those trunks are yours, . . . you hold on to them. . . . Maggie, I am dying.' 'No, Aunt Julia, be patient.' 'I know, Maggie; here is my keys, and what is

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in my trunk is yours.' And she made the remark . . . what she had was Maggie's and for Maggie to hold on to it. 'Here, Maggie, here are the keys,' said she; 'The key of my trunk,' she says; 'Catch hold of my keys,' she says; 'Everything belongs to me in my trunk belongs to you,' says she, 'now.'" The trunks were in the room one upon the other at the foot of the bed, and the keys passed from the donor's hand to that of the donee, by whom they were retained. The donor knew that bank-books were in the upper trunk, and her references at the time of the gift to her money, and to the manner in which she had obtained it, point strongly to the fact of her full knowledge of what she was giving, and to her intention then and there to give the books to the plaintiff. We cannot say that the presiding justice was not justified in finding that there was a present transfer of the actual possession, dominion, and property of the trunks and their contents. See *Fearing* v. *Jones*, 149 Mass. 12; *Tyndale* v. *Randall*, 154 Mass. 103. See also *Pierce* v. *Boston Five Cents Savings Bank*, 129 Mass. 425; *Turner* v. *Estabrook*, 129 Mass. 425.

The defendant contends that the gift was invalid because it attempted to dispose of the donor's whole estate, citing *Marshall* v. *Berry*, 13 Allen, 43. But, fairly construed, the evidence shows a gift only of specific articles, two trunks and their contents. This question does not appear to have been raised at the hearing below. Although some expressions of the donor may be taken as declarations that all her property was in the trunks, they may also mean that all that was in the trunks belonged to her. The question of fact involved must, upon the theory that the presiding justice applied the law as stated in the decisions of this court, have been decided in favor of the plaintiff. We cannot say that it was erroneously decided, and so are not called upon to reconsider the statement contained in the opinion in the case on which the defendant relies.

Decree affirmed.

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JOHN GARRAGAN *vs.* FALL RIVER IRON WORKS COMPANY.

Bristol. March 7, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Master and Servant.

A purchaser of cotton in bales is not bound to have the bagging inspected with a view to ascertaining whether it is strong enough to hold when the hooks are caught into the bagging for the purpose of aiding in moving the bales.

TORT, for personal injuries received by the plaintiff, a servant in the defendant's employ, caused by a fall received while moving a bale of cotton by means of an iron cotton hook. At the trial in the Superior Court, before *Maynard*, J., there was evidence tending to show that, while the plaintiff was attempting to pull the bale upon a wagon by means of a cotton hook which he had inserted in the cotton bagging covering the bale, the bagging gave way, causing the plaintiff to be thrown to the ground and injuring him; that the edge of the bagging which adhered to the hook at the time of the accident was rotten; that cotton frequently came with rotten bagging around it; that this fact could be ascertained by examination; and that this particular bale had arrived for the defendant three or four days before the accident. The plaintiff requested the judge to give the jury the following instructions:

1. "If you find that at the time of the accident the plaintiff, Garragan, was handling the cotton hook and bale in the usual and proper manner, and was using due care, that the bagging of the bale where he took hold was decayed or rotten, and that cotton bagging often comes in that condition, and that such defect might have been discovered by the defendant on proper examination, then the plaintiff can recover.

2. "It was the duty of the defendant to use reasonable care in supplying the plaintiff with safe and suitable materials upon which to work, and if you find upon the evidence in this case that the bagging on the bale which the plaintiff was handling was defective and rotten, and that the defendant could have

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discovered this defect by the use of reasonable care in inspecting the bale, then you may find that the defendant failed to perform its duty to the plaintiff in this respect.

3. "As bearing upon the question whether the plaintiff was in the use of due care, it was not his duty to make an examination of the bagging for the purpose of ascertaining whether it would tear or give way when he inserted the hook, but he had a right to assume that the defendant had used reasonable care in providing him with a safe and suitable material to work with."

The judge declined to give the above instructions.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. W. Cummings, (*E. A. McLaughlin* with him,) for the plaintiff.

J. F. Jackson, for the defendant, was not called upon.

ALLEN, J. The plaintiff's ground of complaint is that the bagging gave way while he was attempting to move the bale of cotton, so that he fell and was hurt. In order to hold the defendant responsible for this accident, the plaintiff must show that it was the defendant's duty to provide for an inspection of the bagging upon the bales of cotton which it bought, in order to ascertain its strength and make the handling of the cotton safer. No evidence was introduced to show any custom or agreement to make such inspection, and no such duty was cast upon the defendant by law. A purchaser of cotton in bales is not bound to have the bagging inspected, with a view to ascertain if it is strong enough to hold if iron hooks are caught into the bagging for the purpose of aiding in moving the bales. The performance of such a duty would be impracticable, and no case is cited which holds that such duty exists. It is unnecessary to consider the defendant's other exceptions.

Exceptions overruled.

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FREDERICK STURTEVANT *vs.* COMMONWEALTH.

Suffolk. March 7, 1893. — April 4, 1893.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ

Writ of Error — Constitutional Law.

The St. of 1887, c. 435, entitled "An act to provide for the punishment of habitual criminals," does not violate Articles XXIV. and XXV. of the Declaration of Rights, or Article I., § 10, or the Fourteenth Amendment, of the Constitution of the United States, and is not unconstitutional.

The word "prison," as used in the St. of 1887, c. 435, § 1, is not limited to the state prison, but includes all places of imprisonment for crime.

Merely formal objections to an indictment to avail should be taken at the trial.

WRIT OF ERROR, to reverse certain judgments rendered for the Commonwealth. The petition set forth "that on or about the eighteenth day of October, A. D. 1887, in the Superior Court held at Lawrence within and for the county of Essex in said Commonwealth, your plaintiff was convicted of the crime of larceny; that on the day aforesaid, in the court aforesaid, he was further adjudged guilty and convicted of having, on the fourth day of January, A. D. 1878, at the Superior Court holden at Salem within and for the said county of Essex, been convicted of the crime of breaking and entering a building in the night-time, and larceny therein, and having been sentenced and committed to the state prison for the term of five years; that on the day aforesaid, in the court aforesaid, he was further adjudged guilty and convicted of having, on the seventh day of February, A. D. 1883, been convicted of the crime of embezzlement, and having been sentenced and committed to the state prison in Concord, Mass., for the term of five years; that by reason of this conviction as aforesaid, your plaintiff was sentenced by said court to be punished by solitary imprisonment one day, and confinement at hard labor for the term of twenty-five years less one day, at the state prison at Boston, Mass., and that your plaintiff is now imprisoned under said sentence."

The assignments of errors so far as relied on were as follows:

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"First. That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provision of Article XXIV. of the Constitution of Massachusetts, relating to 'A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.'

"Second. That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to Article XXVI. of the Constitution of Massachusetts relating to 'A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.'

"Third. That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provision of Article XII. of the Constitution of Massachusetts, relating to 'A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.'

"Fourth. That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provision of Article I., § 10, of the Constitution of the United States of America.

"Fifth. That the law under which the plaintiff was sentenced was unconstitutional inasmuch as its enactment was contrary to the provision of Article XIV., § 1, of the Constitution of the United States of America as amended by 'Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States, pursuant to the fifth article of the original Constitution.'"

The record, after setting forth the various convictions as alleged in the petition, stated: "And the said Frederick Sturtevant, having been twice convicted of crime, sentenced and committed to prison for terms of not less than three years each, is deemed to be an habitual criminal."

R. R. Gilman & W. H. Mitchell, for the plaintiff in error.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

ALLEN, J. 1. The first assignment of error is that the statute is contrary to Article XXIV. of the Declaration of Rights, which prohibits *ex post facto* laws. This objection is disposed of by the recent decision in *Commonwealth* v. *Graves*, 155 Mass. 163.

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The date of the larcenies charged in the indictment was after St. 1887, c. 435, went into effect.

2. The second assignment is that the statute is contrary to Article XXVI. of the Declaration of Rights, which is as follows: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." This article is directed to courts, not to the Legislature. *Commonwealth* v. *Hitchings*, 5 Gray, 482, 486. In the statute, nothing is left to the discretion of the court in fixing the sentence. Moreover, the plaintiff in error does not contend that the length of the term fixed is so great as in itself to show that the punishment is cruel and unusual for the offence; but he says, "All punishments inflicted under an unconstitutional law are cruel and unusual," thus resting on other grounds of objection to the validity of the statute itself. Apart from the objection that the statute is *ex post facto*, the only ground of unconstitutionality urged is that the statute imposes the heavier punishment upon one who has twice before been sentenced and committed to the state prison, while others who have been convicted of the same crimes and sentenced to jails or houses of correction escape this heavier punishment. This argument rests on a misreading of St. 1887, c. 435, § 1, which says nothing about a prior sentence to the state prison, but speaks of having been "sentenced and committed to prison in this or any other State." The word "prison" as thus used is not limited to the state prison, but includes all places of imprisonment for crime. The context shows this plainly, and this is the common meaning of the word as used in the Public Statutes. See Pub. Sts. c. 215, §§ 5, 14, 15, 28, 29; c. 219, §§ 1, 4, 5, 13, 31, 32; c. 220, §§ 31, 51, 52, 72, 73, 74; c. 221, §§ 43, 44, 47, 49, 50, 51, 53; c. 222, §§ 2, 3, 8, 11, 12, 13, 15, 17, 20, 24. *Beard* v. *Boston*, 151 Mass. 96. *Leonard* v. *Leonard*, 151 Mass. 151. The whole foundation of the argument fails, and we need not consider what force it might have if the statute was different.

3. The third assignment of error is that the statute is contrary to Article XII. of the Declaration of Rights. This is the article requiring that charges of crime shall be formal. The plaintiff in error objects to the indictment that it did not in terms set forth that he was an habitual criminal, or that he was

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indicted under the statute. The indictment in two counts charged two distinct larcenies, and then proceeded to aver two former convictions, one for breaking and entering and one for embezzlement, upon each of which he had been sentenced and committed to the state prison. In this respect, the indictment conformed to the rule as held in *Commonwealth* v. *Harrington*, 130 Mass. 35, and *Tuttle* v. *Commonwealth*, 2 Gray, 505, and it was not necessary to go further and allege the conclusion of law that he was an habitual criminal. *Commonwealth* v. *Sanborn*, 14 Gray, 393. 1 Bish. Crim. Proc. § 515, and cases cited. Moreover, the objection was merely formal, and to avail should have been taken at the trial. *Commonwealth* v. *Chiovaro*, 129 Mass. 489, 493, 497.

4. The fourth assignment, as amended, is that the statute is contrary to § 10 of Article I. of the Constitution of the United States, which prohibits *ex post facto* laws. The decision in *Commonwealth* v. *Graves*, 155 Mass. 163, in its reasoning, applies as well when the objection is founded on the Constitution of the United States, as when it rests upon the State Constitution.

5. The fifth assignment, as amended, is that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States. The argument addressed to us under this head is similar to that urged in support of the second assignment, and seems to rest upon the ground stated in the brief of the plaintiff's counsel, that the statute unjustly discriminates against persons in the plaintiff's situation, "and infringes the fundamental privileges and immunities of equal protection to their liberty and equal justice in the courts." We do not see anything else in this objection except that the statute is in its nature *ex post facto*, and that it makes an unjust discrimination against criminals who have previously been sentenced to the state prison. Both of these grounds have been dealt with already, in considering the second assignment.

The sixth and seventh assignments of error are not insisted on in the brief of the plaintiff in error.

None of the assignments of error being supported, the entry must be,

Judgment affirmed.

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ABANDONMENT.

See RAILROAD, 1; WAY, 2.

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ACTION.

In October, 1883, B. made the following written agreement: "Received of A." a certain sum "in full payment for all filters and water-cocks made to date, it being understood A. shall own one undivided half of any patent and improvements that may be made on said filters; also" a certain sum, "for which I am to assign one undivided half of loom-check patent, which is already allowed." To this was added an oral agreement that, if A. would furnish the money necessary for improving and perfecting the filters and water-cocks mentioned and for manufacturing them for sale, B. would do the work necessary to perfect and develop the invention for the benefit of A. and B. jointly, do the business of manufacturing and selling the filters and water-cocks, and would pay A. one half of the net proceeds of the sale. Under this agreement, in 1883 and 1884, A. laid out several hundred dollars "for perfecting hydraulic filtering faucet, and for manufacturing filters and water-cocks." In the summer of 1884, B. got a patent on the water-cock and filter combined in one patent. Later in the same year, B. sold the patent and all the water-cocks he then had for several thousand dollars, and fraudulently concealed the fact until within six years of the date of an action by A.

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against B. to recover A.'s share of that sum. *Held*, that an action for a share of the proceeds could be maintained. *Currier* v. *Hallowell*, 254.

See CONTRACT, 3; CONVERSION; EMPLOYERS' LIABILITY ACT; EQUITY, 7; INSOLVENT ESTATES; LANDLORD AND TENANT, 4; NEGLIGENCE, 3, 15; PLEADING; PROMISSORY NOTE, 2-4, 7; SAVINGS BANK; TRESPASS, 2.

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See EVIDENCE, 10, 11; INTOXICATING LIQUORS, 1-13.

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See COSTS; EQUITY, 9, 10; EXECUTOR.

APPROPRIATION.

1. In the case of payments made upon a contract of conditional sale, there was no appropriation by either of the parties, and nothing which required or justified an appropriation by the court to any one of the articles more than to all of the others. The articles were all bought at one time under a single contract, and the promise to pay for them was one and indivisible. The question was whether the payments should be appropriated to the articles which appeared first in the paper, or to all of them. *Held*, that the payments were made on the contract, and were applicable to the sum due upon it, and not to any part of that sum, nor with any reference to the way in which the aggregate was made up. *Hill* v. *McLaughlin*, 307.

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2. A., by his will, authorized and directed his executors to set apart a certain sum from his general estate and invest it for the benefit of his son E., during his life, the fund to be paid over at E.'s death to his lineal descendants, or, if he should leave no descendants, to the trustees of a certain college. The executors, in 1877, invested a smaller sum in the stock of a certain trust company which they testified they intended as an investment for this trust. In 1878, a letter from the secretary of the company, which mentioned the issuing of a certificate, referred to the subscription as made by "the estate of A." The certificate under which they held the stock was in the name of "B. and C., executors of the will of A.," with no other reference to the trust. Neither of the executors, until 1890, informed E. or any one else that the stock was held as part of the trust fund. A statement of account made by one of the executors in 1882 treated the whole amount of the legacy which was to constitute the trust fund as a liability against the estate, and included the stock subscribed for among the general assets of the estate, and put upon it a certain valuation per share. Until the making of the probate account there was never anything on the books of the executors, either in their accounts with E. or elsewhere, to identify the investment as made on account of the trust fund; and in a conversation one of the executors offered to convey to E. and his sister, the testator's other child, interested as a legatee under the will, other stock which belonged to the executors to make good a loss from this investment. *Held*, that there was evidence which well warranted the finding that the executors had failed to sustain the burden of proving an appropriation of the stock to the trust for the benefit of E. and his descendants. *Sheffield* v. *Parker*, 330.

ARBITRAMENT AND AWARD.

1. An award of arbitrators enclosed in a sealed envelope and sent by mail addressed to "Joseph A. Willard, Esq., Clerk Superior Court, 3 Court House, Boston," is transmitted to the court within the meaning of the Pub. Sts. c. 188, § 8. *Morrell* v. *Old Colony Railroad*, 69.
2. It is not required by the Pub. Sts. c. 188, § 8, that, when an award is "enclosed and sealed by the arbitrators and transmitted to the court," the envelope shall have on it any writing declaring the nature of the contents of the envelope, although it is a common and convenient practice to write on it the title of the case, and a short general description of what is enclosed. *Ibid.*

ARREST.

A district police officer and deputy fish commissioner has no authority to arrest without a warrant a person suspected of having in his possession short lobsters with intent to sell them. *Commonwealth* v. *Wright*, 149.

See EVIDENCE, 5.

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ASSAULT AND BATTERY.

See EVIDENCE, 12.

ASSAULT UPON OFFICER.

See EVIDENCE, 5; TRIAL, 10.

ASSIGNMENT.

See BENEFICIARY ASSOCIATION, 2, 3; WARRANTY, 4.

ATTACHMENT.

A. on September 1, 1890, conveyed real estate to B., who gave A. a writing agreeing to reconvey it when a complaint against A. was disposed of, B. having become surety on a bail bond issuing in the case. The complaint was disposed of on October 3, 1890. On January 22, 1891, at ten o'clock and fifty minutes in the forenoon, B. recorded the deed to him from A. in the registry of deeds, but the writing given by B. to A. was never recorded. On the same day at ten o'clock and forty minutes in the forenoon, C., a deputy sheriff, made an attachment in favor of D. of all B.'s real estate in the county; and at twelve o'clock and twenty-seven minutes in the afternoon deposited in the registry a copy of the writ, with so much of his return as related to the attachment. On March 19, 1891, B. reconveyed to A., and on the same day A. executed a mortgage of the real estate to E. Subsequently D. recovered judgment against B., and C. made a levy on the land by virtue of an execution. *Held*, on a bill in equity by A. and E. against C. and D., to enjoin them from disposing of the property, that B., at the time when the attachment was made, had no record title to the land and no attachable interest therein. *Jones* v. *Mitchell*, 385.

ATTORNEY AND CLIENT.

See CONTRACT, 3; SPECIFIC PERFORMANCE; TRIAL, 2, 3.

AUCTIONEER.

See CONVERSION, 2.

BANK.

See DONATIO CAUSA MORTIS; SAVINGS BANK; TAX.

BENEFICIARY ASSOCIATION.

1. A husband took out two benefit certificates in a mutual aid society, incorporated under the Pub. Sts. c. 115, and subject to the St. of 1885, c. 183,

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each certificate being payable to his wife, who died before him, leaving no issue. *Held*, that as there was no statute giving the wife a vested interest in the certificate, or no provision therein giving a right to her representatives, the contract was to be construed as payable to the wife only in case of her surviving her husband, and, that contingency having failed, there was a resulting trust in favor of his estate. *Haskins* v. *Kendall*, 224.

2. A beneficiary association organized under the Sts. of 1874, c. 375, and 1877, c. 204, (Pub. Sts. c. 115,) issued to A. a certificate, by the terms of which he was constituted a benefit member, and the association agreed "to pay to the heirs at law of said member," in sixty days after due proof of his death, a certain sum. One of the conditions on which the certificate was accepted was that "any assignment of this certificate shall be void unless assented to in writing by said association, but it shall not be invalidated thereby." The St. of 1882, c. 195, provides that a sister of a member may be a beneficiary. *Held*, that A. had a right to assign to his sister a part of the money payable by the terms of the certificate. *Anthony* v. *Massachusetts Benefit Association*, 322.

3. A beneficiary association organized under the Sts. of 1874, c. 375, and 1877, c. 204, (Pub. Sts. c. 115,) issued to A. a certificate, by the terms of which he was constituted a benefit member, and the association agreed "to pay to the heirs at law of said member," in sixty days after due proof of his death, a certain sum. Among the conditions on which the certificate was accepted were the following: "Any assignment of this certificate shall be void unless assented to in writing by said association, but it shall not be invalidated thereby. . . . No agent of the association is authorized to make, alter, or discharge contracts, or waive forfeitures; and any such act to be valid must be done in writing, and signed by the treasurer of the association." A rule of the association also required both the member insured and the present beneficiary to sign the form of assignment. A. assigned to his sister a part of the money payable by the terms of the certificate; and the assent of the association to the assignment was manifested by the signing of the treasurer's name by a clerk, who acted in so doing under the general authority of the treasurer. *Held*, that the assignment was valid. *Ibid.*

4. A benefit order was incorporated in Kentucky for the purpose, among others, of establishing a benefit fund, out of which, on the death of a member of the order, a certain amount might be paid "to his family or as he may direct." This fund was formed and maintained by assessments on the members, each of whom was entitled to a benefit certificate, containing the promise of the corporation to make payment to the person designated by him as beneficiary, which promise was made on condition that the member should comply, not only with all the existing laws of the order, but also with such as might afterwards be enacted. S. became a member of the order, designating as his beneficiary a person who was his creditor, and received a benefit certificate payable to the beneficiary so designated. The order was afterwards re-incorporated in Missouri by a new charter, which limited the persons who might receive payments out of the benefit fund to the family and dependents of members; and a law

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or resolution was passed by the order, requiring all members who held certificates in which persons other than members of the holders' families or their dependents were named as beneficiaries to surrender their certificates, in order that new certificates might be issued to them which should be payable to persons of the classes described in the new charter. S. thereupon represented that the person originally designated as his beneficiary was a dependent, and he was allowed to retain his certificate unaltered. This representation was false, but was made through mistake and was not fraudulent. S. continued to pay all dues and assessments, and died a member of the order in good standing. The laws governing the order when S. became a member provided that, in the event of the death of all the beneficiaries selected by a member before such member's death, the benefit should be paid to his heirs; and the laws governing the order when S. died provided that, in the same event, the benefit should be paid to his widow and children, and if there was neither widow nor child, then to his heirs. At no time, however, did the laws of the order provide in terms for a case in which there was a failure of beneficiaries owing to the invalidity of the designation. S. left next of kin, but no widow or child. *Held*, upon a bill in equity brought by the next of kin of S. to secure the proceeds of his certificate against the order and the person named in the certificate as beneficiary, that the company could not resist payment on the ground that the designation of the beneficiary was invalid. *Held, also*, that the person named in the certificate, having been neither a member of the family of the deceased nor a dependent, was not entitled to the money, and that by a just and liberal construction of the laws of the order the next of kin or heirs were so entitled. *Sargent* v. *Knights of Honor*, 557.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BOND.

See EQUITY, 4.

BOSTON.

See CONSTITUTIONAL LAW, 2; MUNICIPAL CORPORATION; PARTITION, 1.

BOUNDARY.

See EXECUTION, 1; LANDLORD AND TENANT, 8; WAY.

BREAKING AND ENTERING BUILDINGS.

1. On an indictment for breaking and entering, it appeared in evidence that, in pursuance of a preconcerted scheme, A., making a pretence of a wish to purchase an article, got the night clerk at a shop to let him in at about

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midnight, and that, while the clerk was in the cellar getting the article, A. unbolted the door which had been rebolted behind him after his admission and let in B., who concealed himself and remained behind when A. left, and afterwards broke open the money-drawer. *Held*, that in order to convict B. it was not necessary that he should have touched the door, if he procured himself to be let in by an accomplice and entered with felonious intent. *Held, also*, that A., the accomplice inside the house, was guilty of the same offence. *Commonwealth* v. *Lowrey*, 18.

2. If, on an indictment for breaking and entering, there can be said to be any invitation to enter a closed and bolted shop at midnight, the invitation does not extend to thieves when let in by accomplices. *Ibid.*

BUILDINGS.

See Landlord and Tenant; Mechanic's Lien.

BURDEN OF PROOF.

See Appropriation, 2; Employers' Liability Act, 7; Law of the Road, 2; Principal and Agent, 1; Savings Bank.

BURYING GROUND.

See Constitutional Law, 2–6.

BY-LAW.

See Municipal Corporation; Savings Bank.

CANAL.

See Partition, 1, 3.

CERTIORARI.

See Railroad, 2.

CHARITY.

The following clause in a will constitutes a good gift to charity: "After the said O. is no longer my widow either by death or otherwise, I give and bequeath all that may then remain of my property for the benefit of the inhabitants of E. and vicinity, for educational purposes. One third part of said property to be appropriated for a building and appurtenances, which shall be located on Quivet Neck in E., and the other two thirds to be a fund for the support of said institution, the interest of said fund to

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be so appropriated. The whole to be under the exclusive control of the inhabitants of Quivet Neck." The provision as to the "control of the inhabitants of Quivet Neck" is not of the essence of the gift, but is only an administrative detail; and it is not necessary that the testator should have named a trustee. *Sears* v. *Chapman*, 400.

CHATTEL MORTGAGE.

A. mortgaged to B. two separate lots of personal property. B. having foreclosed on the first lot, A. brought a bill in equity against B., praying for an injunction restraining him from selling the remaining property, for an account, and for a decree that, on the payment by A. to B. of the amount due, A. should hold the property discharged of the mortgage. The case was referred to a master, who found that A. surrendered to B. the first lot of property, and authorized him to sell the same at retail and apply the net proceeds on the debt until the property should be disposed of on foreclosure sale; that B. took possession and sold, A. exercising superintendence; that later B. gave A. written notice of a foreclosure sale, duly advertised the same, and then sold by public auction, obtaining a fair price, but not enough to pay the mortgage; that B. did not include in this sale any of the second lot of property, because A. so requested and agreed to provide for the payment of the balance due; that still later, A. paying B. no part of the balance due and B. never having taken possession of the second lot, B. gave A. written notice of a foreclosure sale of the same; that, while B. was in possession of the first lot, B. at A.'s request paid from the proceeds of the retail sales the overdue rent of A.'s store; and that, while so selling, B. at A.'s request purchased certain articles that could not be filled from the stock in the store and the result was beneficial to A. The master further found that an account annexed to B.'s answer was correct, except that interest should be computed from the day when the first foreclosure sale was completed; that the payments stated in the account were for expenditures necessarily incurred by B. with the consent of A.; that B. had never waived his right to continue to hold the second lot under the mortgage, or to sell the same under the power of sale; that A. had waived all informalities of B. and all right to take advantage thereof; and that there was due B. a certain amount with interest. A. filed exceptions to the master's report, which put his case on the theory that the partial sale exhausted the power and released the remaining property. *Held*, that there was no occasion to consider this question, as it was not raised in the bill; and even if the power was exhausted, the lien of the mortgage was not thereby defeated, and might be enforced as though no power of sale had been inserted. *Held*, *also*, that A. could not repudiate transactions entered into solely for his benefit and at his request, all the items to which he objected being legitimate results of such transactions, and that the finding as to waiver was pertinent, and supported by the facts found. *Hopkins* v. *McCrillis*, 97.

See CONVERSION, 2.

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CIDER.

See INTOXICATING LIQUORS, 19.

CITY.

See CONSTITUTIONAL LAW, 2–4, 7; EVIDENCE, 13, 14; NOTICE; PARTITION, 1; SIDEWALK; STREET.

COHABITATION.

See POLYGAMY, 2.

COLLATERAL SECURITY.

See INSOLVENT ESTATES.

COMMISSIONER OF INTERNAL REVENUE.

See OLEOMARGARINE, 3.

COMMISSIONS.

See EXECUTOR.

COMPLAINT.

1. If the record in a criminal case shows that, in all the different stages of the proceedings therein, the police court to which the complaint was made was held by the special justice, in the absence and at the request of the justice, it is no ground for dismissal of the complaint and in arrest of judgment, after a verdict of guilty, that the complaint was addressed to the justice of the court, and that the warrant bore his test. *Commonwealth* v. *Brown*, 168.
2. A complaint on the Pub. Sts. c. 100, § 17, charging the bringing by the defendant into a town in which licenses of the first five classes were not granted certain intoxicating liquors with intent "to sell the same himself, to have the same sold by another, and having reasonable cause to believe that the same is intended to be sold in violation of law," is not bad for duplicity. *Commonwealth* v. *Igo*, 199.

See CONTINUANCE, 2; EVIDENCE, 3, 4; INTOXICATING LIQUORS, 15–19, 21–25; OLEOMARGARINE; TRIAL, 10.

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See EQUITY, 7; GUARANTY; PLEADING.

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CONDITION.

See Beneficiary Association, 2, 3; Deed, 2; Intoxicating Liquors, 6, 9.

CONDITIONAL SALE.

See Appropriation, 1; Conversion, 2.

CONSIDERATION.

See Contract, 2; Deed, 1; Promissory Note, 1–5, 7.

CONSTITUTIONAL LAW.

1. The St. of 1887, c. 435, entitled "An act to provide for the punishment of habitual criminals," does not violate Articles XXIV. and XXV. of the Declaration of Rights, or Article I., § 10, or the Fourteenth Amendment, of the Constitution of the United States, and is not unconstitutional. *Sturtevant* v. *Commonwealth*, 598.
2. The St. of 1889, c. 265, requiring the city of Boston, without compensation, to transfer the Mount Hope Cemetery to the corporation called "The Proprietors of Mount Hope Cemetery," is unconstitutional. The cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and its ownership is protected under the Constitution of Massachusetts, Art. X. of the Declaration of Rights, and the Constitution of the United States, Fourteenth Amendment, so that the Legislature has no power to require its transfer without compensation. *Mount Hope Cemetery* v. *Boston*, 509.
3. The Legislature cannot require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. *Ibid.*
4. The legislative power over municipal property, when it exists, does not extend so far as to enable the Legislature to require a transfer, without compensation, to a private person or private corporation. *Ibid.*
5. A corporation does not become a public one merely by receiving a charter from the Legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. *Ibid.*
6. The corporation known as the Proprietors of Mount Hope Cemetery, incorporated under St. 1889, c. 265, falls within the class of private corporations. *Ibid.*
7. A petition was brought by the mayor and aldermen of the city of Northampton, under the St. of 1890, c. 428, for the abolition of certain grade

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crossings in that city. Commissioners were appointed; and, after the finding of their report and a motion to confirm the same, and before the court had made any final decree, the St. of 1892, c. 311, was passed, which provided that no change shall be made in the grade of the public ways in Northampton where the same are now crossed by one or more railroads at grade, without the consent of the city council expressed by vote duly recorded, and that before a final decree a copy of such vote certified by the city clerk shall be filed in the case. No vote was passed by the city council and no certificate filed in the case. The judge ruled, in a hearing on the petition, that the St. of 1892, c. 311, was not within the power of the Legislature, and void; that the consent of the city council was not necessary to a final decree in the case, and made a final decree confirming the report thereon. *Held*, that the proceeding could not be considered as a suit for the determination of private vested rights, of which the parties could not be deprived except by a taking for a public use and the payment of reasonable compensation; that it was merely a quasi judicial proceeding for enforcing the laws regulating a subject within the control of the Legislature and that the statute was valid. KNOWLTON, LATHROP, and BARKER, JJ. dissenting, on the ground that the statute should be construed only as a direction to the court in regard to the decree to be entered in a particular case pending at the time of its enactment, and not as an amendment of the general law in regard to grade crossings, establishing for all time and in all proceedings a different rule for the change of the crossings mentioned in the petition from that applicable to other crossings in the city and in the State; and that, as so construed, it was unconstitutional. *In re Petition of Northampton*, 299.

See FUGITIVE FROM JUSTICE; INTOXICATING LIQUORS, 20; MUNICIPAL CORPORATION; OLEOMARGARINE, 3; POOR DEBTOR, 1.

CONTEMPT.

See POOR DEBTOR, 1.

CONTINUANCE.

1. The refusal of the Superior Court to continue a case in order to enable one of the parties to examine the clerk of that court, who was not in the court-house at the time and was not summoned as a witness, is not open to exception. *Soper* v. *Manning*, 381.
2. Where there are two shires of a county, in each of which the Superior Court sits alternately, no exception lies to the refusal of the presiding judge to continue the trial of a criminal case from one place to the other, at a sitting held three months later, on the ground that the defendant is a resident of the latter place, to the police court of which the complaint in the case is addressed. *Commonwealth* v. *Hurley*, 159; *Commonwealth* v. *Brothers*, 200.

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CONTRACT.

I. *Making.*

1. A. brought an action against B. for the price of eelskins. A. had sent eelskins in the same way four or five times before, which skins had been accepted and paid for by B. On B.'s testimony, it was to be assumed that if he had admitted the eelskins to be over a certain length, and fit for his business, as A. testified, and the jury found that they were, he would have accepted them; that this was understood by A.; and that there was a standing offer to A. for such skins. *Held*, that A. was warranted in sending B. skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did not impose on B. a duty to act about them; and silence on his part, coupled with a retention of the skins for a reasonable time, might be found by the jury to warrant A. in assuming that they were accepted, and thus to amount to an acceptance. *Hobbs* v. *Massasoit Whip Co.* 194.

See DECLARATION OF TRUST; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 6, 7; WARRANTY, 8.

II. *Consideration.*

2. The doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to the promise of a corporation to pay a dividend to its stockholders. *Ford* v. *Easthampton Rubber Thread Co.* 84.

See PROMISSORY NOTE, 1–5, 7.

III. *Validity.*

3. B., the defendant, signed a contract, in consideration of the promise of A., the plaintiff, to do nothing about a claim of A.'s client against B.'s client until the decision of a suit which B.'s client had against C. and D., and which B. was managing. The contract, which was signed by B.'s client, directed B., to whom it was addressed, when he had collected the money on the suit against C. and D. to pay a certain sum to A., and B. signed underneath the words, "When the above amount is collected, I will pay the same to A." The money was collected by B.'s client of D. alone, C. being only the surety on D.'s bond. *Held*, in a suit by A. against B. to recover the amount named in the contract, that the contract was a binding one; that the jury were warranted in finding that the suit referred to was the suit against D.; that it was immaterial that the whole sum owed to B.'s client was not collected; that the instruction to the effect that, if B.'s client forbade A. to pay the order, A. could not recover, qualified by the statement that, if B. had control over the collection, so that he could receive the money or not as he pleased, his allowing his client to receive it would not make it any the less his collection, was correct; and that the fact that A.'s client, after the breach of B.'s agree-

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ment, brought a suit and recovered judgment against B.'s client upon the original claim against him, which judgment was unsatisfied, did not preclude A. from maintaining his action. *Pelton* v. *Baker*, 349.

See PRINCIPAL AND AGENT, 1, 4, 5.

IV. *Construction.*

4. The rule that, for the purpose of interpreting a document, the court may put itself in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the document, and the presumption that the words used to describe land in a contract to convey the same relate to land owned at the time by the vendor, are to be applied in interpreting a sketch which is part of a memorandum of contract for the sale of real estate. *Baker* v. *Hall*, 361.
5. A. brought a bill in equity against B. to enforce the specific performance of an agreement to purchase certain real estate on or before April 16, 1891. The agreement contained the statement, "provided a release cannot be obtained from present mortgagee to complete transfer as above, the interest shall be allowed said B. at the rate of five per cent per annum until such release is obtained from April 16th, 1891. Other terms and conditions remaining the same." *Held*, that the premises were to be conveyed on or before the day named, unless a release from the mortgagee to which the land was subject could not be obtained by that day, and that, in the latter event, the transfer was to be completed whenever, within a reasonable time, the release could be obtained. *Ibid.*
6. A., a contractor engaged in erecting a building, and B., an independent contractor engaged in doing certain work on the building, entered into an agreement in writing, by which B. was allowed to use A's engines and derricks at the building at a certain rate of compensation, and which contained the following provision: "If any injury shall be occasioned to any person or property while you [B.] are using such engines or derricks, or as a result of such use, you [B.] are to indemnify us [A.] against any damage or expense by reason of the same, notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our [A.'s] employees upon the derrick or engine, may have caused or contributed to the injury." Owing to the defective condition of one of the derricks, while B. was using it, an employee of A., who was not working upon the derrick, was injured, and A. paid him a certain sum in settlement of his claim for such injury. *Held*, in an action upon the agreement, that B. undertook to indemnify A. against the expense incurred by him in his settlement with the injured person. *Woodbury* v. *Post*, 140.

See CONTRACT, 3; EMPLOYERS' LIABILITY ACT, 3; GUARANTY; INSURANCE, 1, 2, 4–6; PLEADING.

V. *Performance and Breach.*

See ACTION; APPROPRIATION, 1; VENDOR AND PURCHASER.

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VI. *Rescission.*

7. If the vendor of a wagon warrants it to carry a certain weight, and it breaks down under a less weight, the fact that it has thus broken down does not prevent a rescission of the purchase and a return of the wagon to the vendor. *Smith* v. *Hale*, 178.

See CORPORATION; MECHANIC'S LIEN, 2; TRESPASS, 1; WARRANTY, 2.

CONTRACTOR.

See EMPLOYERS' LIABILITY ACT, 6; PLEADING.

CONVERSION.

1. In an action by an administratrix for the conversion of the intestate's personal property there was evidence of an agreement to sell and of a subsequent bill of sale, which did not purport to convey the plaintiff's property, but only that of others located in the place where the plaintiff's was stored. *Held*, that the judge rightly ruled that there was no evidence to warrant a verdict for the defendant. *Stimpson* v. *Achorn*, 342.
2. A. delivered goods to B., and B. agreed in writing to pay therefor by instalments, and not to sell or mortgage the same so long as any payments were due. B. mortgaged the goods to C., who took without notice and for value, and had the goods sold by auction for breach of the mortgage, which had been duly recorded in the office of the city clerk. At the time of the mortgage B. was in default according to the agreement, and by the terms thereof A. had an immediate right of possession without demand or notice. *Held*, that the auctioneer was liable to A. for conversion of the goods. *Robinson* v. *Bird*, 357.

See EQUITY, 1; EVIDENCE, 1.

CORPORATION.

After a dividend has been duly declared by a vote of the directors of a corporation, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors held before the time at which the dividend becomes payable according to the vote, if the fact that the dividend has been declared has not been made public, or in any manner communicated to the stockholders, and no fund has been set apart for the payment of the dividend. *Ford* v. *Easthampton Rubber Thread Co.* 84.

See CONSTITUTIONAL LAW, 2–6; CONTRACT, 2; EVIDENCE, 7; LACHES; MUNICIPAL CORPORATION; PROMISSORY NOTE, 4; RAILROAD; TAX.

COSTS.

If, in an action against the maker and the indorser of a promissory note, begun in a municipal court, the defendants answer jointly, and, upon

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appeal to the Superior Court from judgment in their favor, they sever in their answers in that court, setting up different defences, they are entitled, upon prevailing, to separate costs in that court; and having prevailed upon an appeal to this court, they are to be allowed the costs of that appeal also. *Bill* v. *Boynton*, 274.

See EQUITY, 6, 10; PARTITION, 2.

COUNTY COMMISSIONERS.

See EVIDENCE, 7.

COVENANT.

See ESTATE OF PERSONS DECEASED; GUARANTY; LANDLORD AND TENANT, 1, 4–8; PARTITION, 1, 3; WARRANTY, 4.

CRIMINAL LAW.

See ARREST; BREAKING AND ENTERING BUILDINGS; COMPLAINT; CONSTITUTIONAL LAW, 1; CONTINUANCE, 2; EVIDENCE, 2–6, 9–11; FUGITIVE FROM JUSTICE; INTOXICATING LIQUORS; MILK, 1; OLEOMARGARINE; POLYGAMY; PRACTICE, 2; PRISON; TRIAL, 8–10; VARIANCE; VERDICT; WRIT OF ERROR.

DAMAGES.

See DEED, 2; EMINENT DOMAIN; EQUITY, 14; ESTATE OF PERSONS DECEASED; EVIDENCE, 7, 8, 12, 16, 23; EXPERT; INJUNCTION; JURY; LAND DAMAGES; LANDLORD AND TENANT, 4, 7; MECHANIC'S LIEN, 2; NEW TRIAL; PARTITION, 1; SEWER, 2, 3.

DECLARATION.

See EMPLOYERS' LIABILITY ACT, 2; NEGLIGENCE, 3, 7; PLEADING; TRIAL, 5, 7.

DECLARATION OF TRUST.

A., B., and C. agreed orally to attempt to purchase D.'s estate, at a price not to exceed $50,000. A. and B. were each to furnish one quarter, and C. one half, of the purchase money, and a syndicate, in which A. and B. were each to have one quarter interest and C. was to control one half, was to be formed for the development of the land. C. undertook to make the purchase, and, in violation of his agreement with A. and B., made the negotiation in his own behalf, and obtained from D an agreement for a conveyance to C. for the sum of $42,000, of which $30,000 might remain upon mortgage. C. informed A. and B. that he had made the purchase, but concealed from them the price and the fact that the agreement was in his own name, and led them to believe that the purchase had been made pursuant to his agree-

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ment with them, and for the sum of $48,000. Giving them to understand that he was proceeding to form the syndicate, C. then drew up, in his own handwriting, and exhibited to them, a form of agreement for subscribers to a syndicate, in which the equity of the estate was capitalized at $18,000, and the further sum of $2,000 was added for the expense of constructing a street and other incidental expenses, and in which of the $20,000 thus made up one fourth was allotted to each A. and B. This form of agreement contained the name of C., in his own handwriting, as one of the syndicate, but was not otherwise signed, and later he refused to carry out its conditions and destroyed the paper. A. and B. then brought a bill in equity against C. and D. to declare a trust. Upon these facts, the Superior Court ruled that there was no sufficient writing to constitute a valid agreement between C. and the plaintiffs, nor any sufficient declaration of trust; and entered a final decree dismissing the bill without costs to C. *Held*, upon a report of the case, that the decree should be affirmed. *Emerson* v. *Galloupe*, 146.

DECREE.

See EQUITY, 8–10, 14; REDEMPTION, 4; WAY, 2.

DEED.

1. Oral evidence is admissible to show that a mistake was made in the computation of the consideration of a deed; and the grantee's right to recover the amount which he has overpaid is not waived by his acceptance of the deed, or by his payment, after the discovery of the mistake, of a note which he gave as part of the consideration of the deed, and which was received by the grantor as cash. *Cardinal* v. *Hadley*, 352.
2. On a petition for a jury to assess damages for the taking of land by a city under a statute for a public park, it appeared that the petitioners conveyed to the city six years previously land adjoining that in question "for the purposes of a public park," the deed providing that "a strip not less than sixty-five feet wide adjoining the remaining land of grantors, and in length extending the whole distance where said granted premises bound on the remaining land of grantors, to wit, for a distance of $595\frac{10}{100}$ feet, shall forever be and remain a public way." *Held*, that the words "for the purposes of a public park" constituted a restriction enforceable in equity, and that, if the jury believed that the value of the land taken from the petitioners was enhanced in value at and prior to the taking, by reason of its abutting upon land so held by the city under the previous deed, they might include such enhancement in their estimate of damages. *Held*, *also*, that the provision in regard to the way sixty-five feet wide was a condition, a breach of which would work a forfeiture, and not a restriction enforceable in equity. *May* v. *Boston*, 21.

See ATTACHMENT; CONTRACT, 4; EXECUTION, 1; PARTITION, 1, 3; TENANTS IN COMMON; TRIAL, 9; VENDOR AND PURCHASER; WARRANTY, 4; WAY; WRIT OF ENTRY.

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DELIVERY.

See DONATIO CAUSA MORTIS; INTOXICATING LIQUORS, 8; PRINCIPAL AND AGENT, 5.

DEMAND.

See PROMISSORY NOTE, 8; SAVINGS BANK.

DEMURRER.

See MILK, 2; PLEADING; REVIEW, 1.

DEVISE AND LEGACY.

1. A testatrix by her will directed her executors to "pay to the Old Ladies' Home in Boston a sum sufficient to secure a home for life" to her sister. *Held*, that the language of the will was specific, and that there was nothing in it indicating that, if for any reason her sister would not accept such a home, or if it could not be procured, she should be entitled to be supported elsewhere out of the estate. *Hopkins* v. *Colson*, 407.
2. A testator by will gave property to a trustee to pay the income to a son for life, the principal at his decease to go to the son's heirs. Upon the son's death he left a widow, but no issue, and as only next of kin three children of a deceased sister. The fund in the trustee's possession, which was less than three thousand dollars, was made up of the proceeds of both real and personal estate of the testator. *Held*, that the whole fund went to the widow. *Holmes* v. *Hancock*, 398.
3. A testator, after giving by will pecuniary legacies to various persons, added, at the close of the last bequest, "All the aforesaid legacies are to them and their heirs." *Held*, that the word "and" was used in its ordinary sense, and was not to be construed as "or," and that the word "heirs" was used as a word of limitation indicating that the whole interest of the testator in the personal property bequeathed was given absolutely to the legatees alive at his death, but not to the heirs of such as had died before him. *Wood* v. *Seaver*, 411.
4. After giving the rest and residue of the testator's property and estate, real, personal, and mixed, to trustees, in trust to manage the same and make and deliver all deeds proper to invest the purchasers with good titles, "and using the proceeds of all such sales for the purpose hereinafter described," the will provided: "When my estate shall finally be disposed of by my said trustees, or the survivor of them, and all collections made that can be made, then my said trustees, or the survivor of them, shall dispose of the net proceeds in their hands by dividing the same among my heirs at law as provided for by the laws of the Commonwealth of Massachusetts. Payments on account of the first settlement I hereby authorize to be made to my wife, daughter, and son." *Held*, that the fact that the

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estate was to be turned into personalty and the proceeds divided among the heirs at law showed that by those words were meant those entitled to succeed to personal estate in case of intestacy; that the last provision as to payments could not be explained except by assuming that the wife was to share as an heir at law with the daughter and son, as provided for by the laws of the Commonwealth; and that this view was confirmed by looking at the earlier parts of the will, in which the testator three times spoke of his "beloved wife," and by the fact that, if she was not to be included, she would be cut off with a scanty allowance, much less than she would be entitled to by law. *Lawrence* v. *Crane*, 392.

See CHARITY; EQUITY, 5; EXECUTOR; INTEREST; TRUST FUND; WRIT OF ENTRY.

DIVIDEND.

See CONTRACT, 2; CORPORATION, 1.

DIVORCE.

See POLYGAMY, 1.

DOMESTIC RELATIONS.

See PARENT AND CHILD; POLYGAMY.

DONATIO CAUSA MORTIS.

Where in a suit in equity there was evidence tending to show that the donor upon her death bed, when almost *in extremis*, gave to the donee, as a present gift, two trunks and their contents, which were at the foot of the bed upon which she lay, at the same time handing to the donee the keys, and declaring that the trunks and all in them were the donee's, and that the donor knew that she had certain bank-books in the trunks at the time of the gift, and referred at the time of the gift to her money and to the manner in which she had obtained it, it cannot be said that the presiding justice was not justified in finding that there was a present transfer of the actual possession, dominion, and property of the trunks and their contents, including the bank-books. *Debinson* v. *Emmons*, 592.

DRUGGIST.

See EVIDENCE, 10, 11; INTOXICATING LIQUORS, 1–18.

EASEMENT.

See LANDLORD AND TENANT, 9–11; NEW TRIAL; SEWER.

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ELECTION.

See Costs; Equity, 7; Landlord and Tenant, 5; Trial, 5, 7.

ELECTRIC LIGHTING.

See Insurance, 1; Landlord and Tenant, 9–11.

EMINENT DOMAIN.

1. Where damages for land taken under a statute for the purposes of a public park are to be estimated as in cases of laying out, altering, or widening highways under the Pub. Sts. c. 51, § 3, which provides that the damages shall be fixed at the value of the land before such laying out, alteration, or widening, the owner is to be compensated by the payment of the fair value at the time of the taking. It is the purpose of the Legislature not to permit owners to recover damages at a value enhanced by a public improvement which owes its existence to the change of use of the very land to be paid for. *May* v. *Boston*, 21.
2. On a petition for a jury to assess damages for the taking of land by a city under a statute for a public park, the judge declined to instruct the jury that, if they believed that the land had at and prior to the time of taking been increased in value by reason of the contemplated laying out of a park way which was to include land conveyed by the petitioners to the city six years previously, but not the land for the taking of which the petitioners claimed damages, the jury might include such increase in value. *Held*, that the request would have been correct as applied to a case in which it appeared that there was a definite and settled plan for laying out a defined park which did not include the land taken from the petitioners, and that the taking of the petitioners' land was for a new and different public improvement. *Ibid.*
3. On a petition for a jury to assess damages for the taking of land by a city under a statute for a public park, the judge declined to instruct the jury, as requested by the petitioners, that, if the jury believed that the land had at and prior to the time of taking been increased in value by reason of the likelihood that a public park was to be constructed adjoining, but not including, the land taken, they might include such increase in value in their estimate, and that, if they believed that the land had at and prior to the time of the taking been increased in value by reason of the likelihood that a parcel of land adjoining that in question conveyed six years previously by the petitioners to the city for the purposes of a public park was to constitute a portion of a more extended parkway or system of parks, they might include such increase in value in their estimate. *Held*, that the requests were rightly refused, because the "likelihood that a public park was to be constructed adjoining, but not including," the land taken from the petitioners, did not exclude the possibility that, when the

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scheme was carried out by locating the park on the land, it would include this land, in which case it would be paid for at its value without increase from the improvement. *May* v. *Boston*, 21.

See CONSTITUTIONAL LAW, 2–6; DEED, 2; EVIDENCE, 7, 8, 16, 17; EXPERT; JURY; LAND DAMAGES; NEW TRIAL; PARTITION, 1; SEWER.

EMPLOYERS' LIABILITY ACT.

1. Whether an action for the death of a person occasioned, while employed in a sewer trench in process of construction by a town, by the caving in of the walls of the trench, comes within the St. of 1887, c. 270, § 1, cl. 1, as for a death caused "by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer," *quære*. *Conroy* v. *Clinton*, 318.
2. In an action under the St. of 1887, c. 270, for the death of C., occasioned while employed in a sewer trench in process of construction by a town, by the caving in of the walls of the trench, the declaration alleged that the defects "in the condition of the ways, works, or machinery . . . consisted in using decayed, rotten, unsafe, and unsuitable planks and timbers for bracing up the sides of the trench of said sewer; that the said planks and timbers used as aforesaid were placed so wide a distance apart on the sides of the trench of said sewer as to be totally inadequate and insufficient to sustain and keep in place the sides of the trench aforesaid; that at the time said C. was killed the bracing had been negligently and carelessly suffered to remain in place a long time, to wit, the space of twenty-four hours, without being tightened or fixed or made secure, and in consequence thereof had become loose, unsafe, and utterly inadequate to sustain and keep in place the sides of the said trench." The evidence was, that the planks and timbers used for bracing up the sides of the trench were sound, and there was an abundant supply of material furnished; that the shoring and bracing were entirely in C.'s charge; and that he was paid higher wages than the other workmen to superintend the work; and there was conflicting evidence on the point whether he himself put in the shoring and bracing at the place of the accident. The judge ruled that the plaintiff had failed to make out her case, and directed a verdict for the defendant. *Held*, that the plaintiff had no ground of exception. *Ibid.*
3. It is a defence to an action under the St. of 1887, c. 270, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by reason of the defective condition of the "ways, works, or machinery" of the defendant, that the plaintiff, when he entered upon the employment, knew and fully appreciated the danger to which he was to be exposed. *O'Maley* v. *South Boston Gas Light Co.* 135.
4. An ordinary weaver, whose usual work is merely to operate a loom, is not a person intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence within the meaning of the St. of 1887, c. 270, § 1, cl. 2, merely because it is also his duty, when his loom

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gets out of repair, to notify the loom fixer to put it in order. The weaver and loom fixer are fellow servants. *Roseback* v. *Ætna Mills*, 379.

5. In an action against a railroad corporation, under the St. of 1887, c. 270, § 1, cl. 2, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the negligence of a person in the service of the defendant intrusted with and exercising superintendence, it appeared that the plaintiff was on a hand-car and was run into by a "wild train," that is, a train running by special orders and not regularly to be expected at the same time; that the train and the hand-car were moving towards each other round a curved ledge of rock, which prevented their seeing each other until within a distance of from ninety to fifty feet; that the train was on an up grade, going ten or twelve miles an hour, and the hand-car on a down grade, going from twelve to fifteen miles an hour; that it was a common thing for wild trains to come along, and the plaintiff, who had worked on this road as a section hand for the greater part of the last fifteen years, "knew about the habits of running the road." The defendant's rules provided that "enginemen and conductors who are to run wild trains or engines will see that the train preceding them carries a red signal for them," and that this was a notice to sectionmen that a wild train was to follow; that "if, however, for any reason, it is impossible for them to do so, they must . . . run at a slow rate of speed around all curves", that "wild trains will, when a flag has not been sent on a previous train, before turning any curve, reduce rate to a speed not exceeding fifteen miles per hour"; that "wild trains may be run over the road on telegraphic orders without notice"; and that wild trains should whistle one mile before turning a curve. It also appeared that, in the present case, it was impossible for the wild train to get the red flag on to the train next ahead, because the latter had started. There was no direct evidence that the plaintiff knew the rules, but the section foreman in charge of the hand-car had a copy of them. The plaintiff testified that they did not know when the train was coming; and the engineer of the train testified that he whistled before he got to the curve, perhaps within fifteen or sixteen rods, and, on cross-examination, that there was "no notice to them that train was coming only so far as whistle was concerned." *Held*, that the jury would not have been warranted in finding the defendant negligent; and that the defendant could not be held liable on the ground that the conduct of the hand-car was governed by the section foreman, who was a person intrusted with and exercising superintendence, and to whose negligence, while superintending, the accident was due. *Shepard* v. *Boston & Maine Railroad*, 174.

6. The inference from the St. of 1887, c. 270, § 4, plainly is, that the employer shall be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. By the negligence of the

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employer is meant his own negligence, in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employer is spoken of. *Toomey* v. *Donovan*, 282.

7. If, in an action brought under the St. of 1887, c. 270, for causing the death of an employee, the evidence introduced is of such a nature that the questions how the accident happened and whether the deceased was using due care can be answered only by conjecture, the action cannot be maintained. *Irwin* v. *Alley*, 249.
8. In an action against a railroad corporation, under the St. of 1887, c. 270, for causing the death of a brakeman in its employ, who was a skilful man and was apparently killed by reason of his head coming in contact with a bridge, no one having seen the accident, evidence that his duty required him to be on the rear car of a freight train, which on this occasion was a tall refrigerator car attached to the rear end of the caboose, and to watch the rear end of the train, riding on the top of the car with his face to the rear, although he knew there were low bridges under which the car must pass, warning of the approach to which was expected to be given by tell-tales, one of which, guarding the approach to the bridge in question, was out of order, will justify the inference that he was in the exercise of due care. *Maher* v. *Boston & Albany Railroad*, 36.
9. In an action against a railroad corporation, under the St. of 1887, c. 270, for causing the death of a brakeman in its employ, who, no one having seen the accident, was apparently killed by reason of his head coming in contact with a bridge while riding on the top of a tall refrigerator car attached to the rear end of the caboose of a freight train, the facts that the speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death, that the men in the caboose, although very near him, heard no outcry, and that the defendant's workmen upon another train, who picked up the dead body, were not called as witnesses, justify the inference that he died instantly, or without conscious suffering. *Ibid.*
10. In an action against a railroad corporation, under the St. of 1887, c. 270, for causing the death of a brakeman in its employ, who, no one having seen the accident, was apparently killed by reason of his head coming in contact with a bridge, while riding on the top of a tall refrigerator car attached to the rear end of the caboose of a freight train, the declaration alleged negligence in running the car under the bridge, and also in improperly guarding the approach to the bridge. At the trial, there was evidence that this was not a customary arrangement of the train, the caboose usually being at the rear end; that the speed of the train was about twenty miles an hour, which was also unusual; and that the tell-tale guarding the approach to the bridge was out of order. The defendant asked the judge to rule that the jury could not find for the plaintiff, on the ground that the defendant negligently ran the car under the bridge. The judge refused so to rule, and, while in his charge the contention that the car was run carelessly was adverted to, the jury were instructed that, in order

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to find for the plaintiff, they must be satisfied that the defendant was negligent in not having the tell-tales, and that their absence was the cause of the accident. *Held*, that the defendant had no ground of exception. *Maher* v. *Boston & Albany Railroad*, 86.

See NEGLIGENCE, 3, 5, 11; PLEADING; TRIAL, 7.

EQUITY.

I. *Jurisdiction and General Principles.*

1. Where a bill in equity for an account states a case disclosing a liability in trover, which is barred by the statute of limitations, this court will not entertain jurisdiction merely on the ground that the property, when converted, belonged to an infant. *Ela* v. *Ela*, 54.
2. B., having contracted to build A. a house, made a sub-contract with C. for a certain sum, payable when the work was done. A. obtained B.'s consent that three hundred dollars of the principal sum due from A. to B. should be paid to C. "on account of the labor done, and to be done under the sub-contract." The money was tendered to C. and he declined it. C.'s work was not then completed, and there was nothing to show that anything was due him. A. brought a bill in equity against C. to restrain him from enforcing a mechanic's lien by sale of the premises so far as the same was claimed for the sum tendered. *Held*, that if the amount tendered was in fact then due C., and C.'s contention was sound that the tender of an amount due less than the total sum discharges the lien *pro tanto*, although not accepted, A. could have pleaded this in defence of the action brought to enforce the lien, and if, on the other hand, there was nothing due C. at the time of the tender, he was not obliged to receive the money on account. *Patch* v. *Collins*, 468.
3. Upon the dissolution of a partnership existing between A. and B. there was an understanding or agreement that the settlement of the affairs of the partnership should be made on the basis of a payment by B. to A. of the balance due, as shown by a proper adjustment of all the accounts on the books of the firm. A certain sum was paid as that balance, but an item of a much larger amount in favor of A., which should have been included, was omitted by a mistake of A., and either by a mistake of B. or with knowledge that it was not included. A. acted in the belief that the account stated was correct. *Held*, that A. could maintain a bill in equity against B. to recover the sum so omitted. *Moors* v. *Bigelow*, 60.
4. A bill in equity brought by A. against B. alleged that they were partners; that, on the day of the dissolution of the partnership, A. as principal, with C. as surety, executed a bond to B. for the faithful performance by A. of the contracts of the late firm with its customers; that, to procure C. to sign, A. had to deposit with him a certain sum of money; that the conditions of the bond had all been performed; that B. had had notice and been offered proof thereof, which he had refused to examine, that he had refused to give up the bond on request; and that C. had refused to deliver the sum paid to him until the bond had been exhibited to him discharged

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by B. The prayer was that B. be ordered to deliver up the bond discharged. *Held*, that the bill was rightly dismissed, with costs. *Brown* v. *Boyd*, 470.

5. A testator left a widow and several minor children, and by his will, which was admitted to probate, gave, besides other bequests, legacies to his two daughters, and the bulk of his property to the widow in trust for the benefit of his children, to be applied in her discretion. The widow never acted as trustee under the will, and the provisions of the will were never executed. The testator also left a profitable business, which was carried on by the widow, with the assistance of her children, and which increased largely in value. The widow and the children lived together as one family until the children came of age and married, and they assisted her in the work of the house as well as in the business. She was recognized by the children as the head of the household and of the business, and she had the possession, control, and management, with the assent of the children, of all the property left by her husband, and of its increase. There was never any express agreement as to wages, board, or clothing, but all were supported from the proceeds of the business until marriage or death. No account was kept of earnings or services, and no charges were made or credits given, and no books of the business were kept. The two daughters married, each receiving a certain sum upon her marriage, and they continued to render services in the house and in the business after their marriage. Within six years after such services were rendered, the two daughters brought a bill in equity against their mother and brothers to recover their share of the fund. The case was referred to a master, who found that the plaintiffs were entitled to recover a certain sum for their services, their shares of a deceased sister's legacy, which had not been separated from the estate, and their own legacies. It was also found that the services of the plaintiffs were rendered upon the understanding, which was common to the plaintiffs and to the defendant, their mother, that the plaintiffs should derive pecuniary benefit from the successful prosecution of the business, and that all were to work together. The understanding did not go so far as to fix the terms or the extent of the benefit they were to receive, but this was left very much to the mother, who took and held the property, but she had not the discretion or right to refuse to allow a reasonable share or sum to the plaintiffs, to be determined in view of the result of the business; and she did not repudiate this understanding, or her obligations under it, until within six years prior to the institution of this suit. *Held*, that the mother was a trustee; that the plaintiffs were entitled to recover the sums found by the master; that the defendants other than the mother were properly made parties defendant; and that the defences of the statute of limitations and of laches were not open. *McGuire* v. *Devlin*, 63.

See CHATTEL MORTGAGE; DECLARATION OF TRUST; DEED, 2; DONATIO CAUSA MORTIS; EVIDENCE, 15; HUSBAND AND WIFE, 4; INJUNCTION; LACHES; PRINCIPAL AND AGENT, 4, 5; SPECIFIC PERFORMANCE; TRADE-MARK; WARRANTY, 4; WAY, 2.

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II. *Pleading and Practice.*

6. When many persons have a common interest in a fund, and one of them, for the benefit of all, brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay. *Davis* v. *Bay State League*, 434.

7. When equitable matter can be used as a defence to an action under the St. of 1883, c. 223, § 14, or as the foundation of a suit in equity to enjoin the prosecution of an action, although a party can elect whether he will proceed in one way or the other, after he has elected to proceed in one way and has taken the opinion of the court upon the merits of the proceeding, he ought not, without good cause shown, to be permitted to abandon that, and to avail himself of the chance of obtaining a more favorable decision by a separate proceeding before another tribunal. *New York, New Haven, & Hartford Railroad* v. *Martin*, 313.

8. The findings of a single justice of this court sitting in equity, upon questions of fact, will be sustained by the full court upon a report of the case, unless they are clearly erroneous. *Sheffield* v. *Parker*, 330.

9. Upon an appeal in equity from a decree of a justice of the Superior Court, where there is no statement of rulings made or of facts found, but where the evidence taken under the rule is reported, the decree will stand, unless giving due weight to the decision of the court below so far as findings of facts are involved, it clearly appears to be erroneous. *Debinson* v. *Emmons*, 592.

10. On an appeal from the decree of a single justice in equity, the only question raised was one of fact, and the evidence tended so strongly to support the decree that the court was convinced that the appeal was frivolous. *Held*, that the prevailing party was entitled to double costs and interest at twelve per cent, and that the decree should be affirmed with such modifications as were rendered necessary by the lapse of time and the order for costs and interest. *Howland* v. *Rooke*, 590.

11. If the plaintiff in a second bill in equity does not seek relief, if the first bill is dismissed, then, on the first bill being dismissed, the second is rightly dismissed also. *Clark* v. *Patterson*, 388.

12. When the objection of want of parties is taken by plea or answer to a bill in equity, the defendant must give the names of the necessary parties, especially when they are peculiarly within his knowledge. *Case* v. *Minot*, 577.

13. If an injunction cannot properly be granted on a bill in equity without the addition of parties defendant, the court, even, in the absence of proper pleadings, will take notice of the fact, and direct the cause to stand over in order that the necessary parties may be added. *Ibid.*

14. When a plaintiff brings a bill in equity for equitable relief to which he is then entitled, and a reason for denying such relief afterwards arises pending the suit, the bill will not, for this cause, be dismissed, but will be retained for the assessment of damages. *Ibid.*

See PARTITION; REDEMPTION.

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ESTATE IN ENTIRETY.

See Tenants in Common.

ESTATE OF PERSONS DECEASED.

A testator gave a fund in trust for his wife, directing the trustee to pay over to her what she desired, and, upon her death, to dispose of it according to her will; but if she made no will, then to pay one half of the fund to his "heirs at law then surviving, they taking by right of representation," and the other half to his wife's heirs, ascertained in the same manner. The wife agreed with his heirs, then consisting of a brother, a sister, and the children of deceased brothers, not to divert the fund from them by will. Subsequently the sister died, leaving a son and a daughter, and the brother then covenanted with the wife for seven thousand dollars to protect her from her agreement and to obtain for her a release from such heirs. After some of the children of the deceased brothers had given him formal releases, and others had accepted parts of the money, the brother died unmarried, childless and intestate; and the sister's daughter, as his administratrix, ratified his covenants and releases, and paid other portions of the same money to the rest of the brothers' children, but she gave no release and accepted none of the money herself. The wife afterwards died, disposing of the entire fund by will away from her husband's heirs, and on suit brought by the heirs of the testator, her agreement was enforced as to the sister's children, who alone were not estopped. Suit was then brought by the executor of the wife against the heirs of the brother, after his estate had been settled by his administrators, to charge them on his agreement with the wife. *Held*, that the omission of the plaintiff to present his claim to the Probate Court, and to obtain an order that the administrators of the brother's estate should retain sufficient assets to satisfy it under the Pub. Sts. c. 136, § 13, was not a bar to a suit against the heirs under the Pub. Sts. c. 136, §§ 26, 27. *Held*, *also*, that the ratification by the administrators of the brother's agreement with the wife bound his heirs also, and that the measure of damages for the breach of the agreement was not limited to the seven thousand dollars paid by the wife, but included the whole loss to her estate, if not in excess of the sum received from the brother's estate by his heirs. *Bullard* v. *Moor*, 418.

See Appropriation, 2; Equity, 5; Interest.

ESTATE TAIL.

See Writ of Entry.

ESTOPPEL.

See Principal and Agent, 2.

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EVICTION.

See INJUNCTION; LANDLORD AND TENANT, 4, 7, 9.

EVIDENCE.

1. In an action by an administratrix for the conversion of the intestate's personal property, declarations of the intestate, who was the husband of the plaintiff, that he had put all his property out of his hands, it not being suggested that the statement referred to any other disposition of personal estate than a gift to his wife, was held rightly excluded. *Stimpson* v. *Achorn*, 342.

2. At the trial of an indictment charging A. with forging a deed, and A. and B. with uttering the forged deed, A. called as a witness B., who testified that A. employed him to get a sum of money upon a mortgage for the benefit of the person whose signature to the deed was alleged to be forged; and that he saw A. about a week after the money was paid over to A., who at that time told him what he had done with the money. B. was then asked, "What did he say he had done with it?" This question was excluded. *Held*, that A. had no ground of exception. *Commonwealth* v. *Bingham*, 169.

3. At the trial of a complaint for the illegal keeping for sale of intoxicating liquors, evidence that the defendant, a woman, upon her arrival at the police station after her arrest, took from her garments and threw away a lager beer bottle containing whiskey, is competent. *Commonwealth* v. *Hurley*, 159.

4. A police officer may testify, on the trial of a criminal case, to material facts within his knowledge, although he was acting unlawfully when the facts came to his knowledge. *Ibid.*

5. At the trial of an indictment for an assault upon A., committed while he was attempting to board the defendant's boat for the purpose of arresting him, and after he had said to the defendant, "I am a State officer, and am coming on board," A. may testify that, at the time of the assault, he was a district police officer and a deputy fish commissioner. *Commonwealth* v. *Wright*, 149.

6. If the defendant's counsel on an indictment for robbery puts in evidence the substance or effect of the charge made by the witness, a police officer, when he committed the defendant, it is competent for the Commonwealth to prove the exact words the witness used in making the charge. *Commonwealth* v. *Armstrong*, 78.

7. At the trial of a petition before a sheriff's jury, for an assessment of damages occasioned to the petitioner by the taking of his land by a railroad corporation, evidence of a declaration of the general manager of the corporation as to the purpose to which the land was to be put is incompetent; and the award by the county commissioners of damages for the taking is also properly excluded. *Wellington* v. *Boston & Maine Railroad*, 185.

8. In an action in which the value of land is in controversy, evidence of the sum awarded by a jury for other land in the vicinity, taken by the Com-

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monwealth under the right of eminent domain, is inadmissible. *Howe* v. *Howard*, 278.

9. At the trial in the Superior Court, on appeal, of a criminal case, a witness cannot testify to what he heard another person, who is ill and unable to attend the trial, testify to at the trial of the case in the lower court. *Commonwealth* v. *McKenna*, 207.

10. At the trial of an indictment against a retail druggist holding a license of the sixth class under St. 1887, c. 431, for selling intoxicating liquor to a minor, the defendant offered evidence to show that the minor bought the liquor for his mother, who was sick. *Held*, that, as the sale was illegal whether made to the minor as a principal or as an agent, the evidence was rightly excluded. *Commonwealth* v. *Gould*, 499.

11. At the trial of an indictment against a retail apothecary who held a license of the sixth class under St. 1887, c. 431, charging him with unlawfully exposing and keeping for sale intoxicating liquors, it appeared that the defendant had made a number of different sales to each of several persons upon certificates signed by them, stating that they wanted the liquor for medicinal purposes. Evidence of a witness for the government, who was well acquainted with the different purchasers and had seen each frequently during the period covered by the alleged illegal sales, that they all appeared to be well, so far as he could see, and that he did not know of their having any sickness or of any sickness in their families, was *held* to be relevant either to the belief of the defendant as to the purpose for which the liquor was wanted, or to the actual purpose of the purchasers in buying it, and therefore rightly admitted. Evidence of the purchasers themselves as to the real purposes for which they bought the liquor was, for the same reason, rightly admitted. *Commonwealth* v. *Joslin*, 482.

12. In an action for an indecent assault upon a woman, evidence of specific acts of the plaintiff, more than twenty years previously, tending to show that she had repeatedly made false charges of indecent assaults upon her, with a view to extort money from innocent men, although limited to the question of damages, is incompetent. *Miller* v. *Curtis*, 127.

13. In an action against a city for personal injuries occasioned by an alleged defect in a sidewalk which the city is bound to keep in repair, it is not competent for the city to show that no accident has previously happened at the place of the alleged defect. *Marvin* v. *New Bedford*, 464.

14. In an action against a city for personal injuries occasioned by an alleged defect in a sidewalk which the city is bound to keep in repair, an official who has had charge of the repair of the streets and sidewalks for some years, and who is familiar with the condition of the streets and sidewalks of many of the cities of the Commonwealth, cannot be asked the questions, "Whether it is common to find in your experience among the cities that you have visited depressions in the sidewalk caused by irregularities in the paving or covering large enough to admit a portion of the foot, — the foot of an ordinary adult?" "Is it an infrequent thing to find depressions to exist between flaggings in different parts of the city?" and, "Is it common for depressions to be found in flagged sidewalks large enough to insert part of the foot?" *Ibid.*

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15. If the inquiry, upon the hearing of a bill in equity, is in regard to a contract of settlement of the affairs of a partnership between the plaintiff and the defendant, and the reasons and motives for making it, evidence as to whether the plaintiff subsequently advanced the overdue interest on a first mortgage of property, a second mortgage of which was held by him as collateral security for an account guaranteed by the defendant in the settlement, is properly excluded. *Moors* v. *Bigelow*, 60.

16. On a petition for a jury to assess damages for the taking of land under a statute for the purposes of a public park, evidence of a printed report of the park commissioners containing a recommendation of their advisory landscape architect ten years previously is too remote to show that the project for a park had taken definite form previous to the time in question, such that the enhanced value of land in the vicinity was founded on a settled plan which did not include the petitioners' land, and which had ceased to have indefinite features, under which their land was liable to be taken and paid for at a value unaffected by the project. *May* v. *Boston*, 21.

17. On a petition for a jury to assess damages for the taking of land, in April, 1890, by a city under a statute for a public park, the petitioners called a witness, who testified as an expert to the value of the petitioners' land, and further testified that a land company of which he was treasurer had sold, in November, 1891, through him, land directly opposite that of the petitioners, and was asked at what price the sale was made. The judge excluded the testimony. *Held*, that the exclusion was within the discretion of the judge. *Held*, *also*, that it did not appear that the land inquired about was situated similarly to that of the petitioners, and that its value might have been greatly changed by the location of the park, or by other causes, in the interval between April, 1890, and November, 1891. *Ibid.*

18. A policy of insurance contained a provision that it should be void if, without the assent in writing or in print of the company, naphtha should be used by the insured on the premises insured. While a naphtha torch was being used to burn off the old paint preparatory to repainting, the building caught fire and was consumed. *Held*, in an action on the policy, that, as bearing on the question whether the use of a naphtha torch would increase the risk, the company might show, if it could, by an expert in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use; but that the expert could not be asked his opinion as an expert as to the actual effect of the use of naphtha in reference to danger from fire. *First Congregational Church* v. *Holyoke Mutual Fire Ins. Co.* 475.

19. A policy of insurance contained a provision that it should be void if, without the assent in writing or in print of the company, naphtha should be used by the insured on the premises insured. While a naphtha torch was being used to burn off the old paint preparatory to repainting, the building, which was covered with soft pine sheathing, tongued and grooved and put on horizontally, caught fire and was consumed. *Held*, in an action on the policy, that the testimony of experts in regard to the proper

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and usual way of removing paint was rightly admitted. *Held, also*, that, as it is largely within the discretion of the judge to determine how far to go into the trial of collateral issues, he could exclude the question, "Whether or not the sheathing of the church caught fire at any time previous to the day the church was burned by the use of the torch?" *First Congregational Church* v. *Holyoke Mutual Fire Ins. Co.* 475.

20. In an action for personal injuries the plaintiff's physician was asked, upon cross-examination, if he did not say to a patient that he did not believe the plaintiff could get anything out of the defendant, because he could not make him stay in bed. He replied that he could not remember. The defendant called the patient, who testified that the physician said to him, in answer to a question, that if the plaintiff had been hurt badly enough to be confined to his bed, he might recover. *Held*, that the evidence was admissible to show statements by the physician more or less inconsistent with his testimony, in that they treated the plaintiff's injury as less serious than he represented it on the stand. *Liddle* v. *Old Lowell National Bank*, 15.

21. In an action against a gas company for personal injuries occasioned by its alleged negligence in the conduct of its business, a printed notice issued by it to gas consumers, calling attention to the liability of leaks from the digging up of the streets by various corporations, and requesting compliance with certain rules, and which was distributed by its agents within a year before the accident, is admissible in evidence. *Powers* v. *Boston Gas Light Co.* 257.

22. In an action against a railroad corporation for personal injuries occasioned to an employee of another railroad corporation, by having his foot caught in an unblocked frog in the track of the former corporation, while in the performance of his duties in delivering a car upon its tracks, a photograph taken the next morning after the accident, which occurred in the evening, showing the condition of other frogs near by, having been put in evidence without objection, is competent to be used to show that the other frogs were unblocked, the defendant's section master having testified, in substance, that he kept all the frogs blocked, including the one which caused the accident. *Turner* v. *Boston & Maine Railroad*, 261.

23. In an action against a railroad corporation for personal injuries occasioned to the plaintiff, resulting in his losing both legs below the knees, a physician testified, without objection, that he had recommended the plaintiff to go South or West for the recovery of his health; that it was necessary that a person should go from here with him; that he was in the incipient stages of consumption; and that, while his injuries would not directly produce this disease, they would produce a condition of body favorable to its development. He was then allowed, against objection, to testify as to the price for the services of such a trained nurse as would be competent to take care of the plaintiff. *Held*, that the defendant had no ground of exception. *Ibid.*

24. In an action against a railroad company for personal injuries, it was in dispute whether the approach of an inward train at 5.02 P. M. was hidden from the plaintiff by an outward train delivering passengers at the station

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where the accident occurred. The plaintiff contended that the entries from a telegraphic train report sheet kept in the defendant's train despatcher's office in Boston should not have been admitted in evidence, because they did not tend to show that no outward train was at the station at 5.02, the sheet not purporting to contain reports of all outward trains. *Held*, that the bill of exceptions did not state that this objection was stated at the trial, and that the court could not say that even in this view the entries were immaterial, as upon the plaintiff's testimony he might claim that the outward train, to the presence of which he had testified, was one which should have been reported on the sheet; so that the entries, if competent, were material in that aspect of the case, if in no other. *Donovan* v. *Boston & Maine Railroad*, 450.

25. The plaintiff, in an action against a railroad company for personal injuries, having objected to the competency as evidence of the train sheet kept in the defendant's train despatcher's office, also excepted to testimony explaining how it was made and used, and that it was part of a system customarily employed for thirty years. *Held*, that the evidence was competent to show that the sheet was made in the ordinary course of the defendant's business, and to enable the court and jury to interpret it, and that if the plaintiff desired to have its effect limited he should have requested instructions. *Ibid.*

26. As telegraphic messages are read by sound, as well as automatically recorded in symbols, entries from a telegraphic train report sheet kept in the office of a railroad train despatcher stand upon the same footing as if made from oral statements uttered at the indicated station and audible in the despatcher's office, or in view of the symbols in which the manipulation of his instrument by the operator who sends the message makes it visible at the receiving station, the entries are as if made from his signals given at the place of sending and visible in the despatcher's office. They are not, therefore, governed by the rule applied in the case of book charges for goods delivered by a servant whose entries or marks are transferred to his master's account-book. *Ibid.*

27. Where there is no reasonable possibility that any designed untruth had part in placing upon the train sheet kept in the train despatcher's office of a railroad the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and it is sufficiently identified as genuine, it is competent evidence as an act rather than a declaration without the production or proof of the death of the operator who sent the messages; and its entries material to the issue are admissible and proper for the jury, notwithstanding the fact that it was made by the servants of the party by whom it was offered. *Ibid.*

28. When entries from a telegraphic train sheet kept in the train despatcher's office of a railroad were read at the trial of an action against the railroad, the sheet itself was not put in, and the plaintiff made no request, either then or afterwards, that it should go to the jury, but merely objected to the withdrawal of certain entries. *Held*, that this was only an exception to the withdrawal by the court of testimony once admitted; which withdrawal was within the discretion of the presiding justice. *Held*,

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also, that in any event it was not shown that the plaintiff was harmed, as there was no presumption that one part of such a document contradicts another, and it was nowhere made to appear that the entries withdrawn or the whole sheet tended in any way to discredit the entries admitted. *Donovan* v. *Boston & Maine Railroad*, 450.

See CONTRACT, 4; CONVERSION, 1; DEED, 1; EMPLOYERS' LIABILITY ACT, 8, 9; EQUITY, 9; EXCEPTIONS, 1, 2; EXPERT; INSURANCE, 3; INTOXICATING LIQUORS, 5, 12, 13, 16–19, 21–25; LAND DAMAGES; LANDLORD AND TENANT, 8; MECHANIC'S LIEN, 3; MUNICIPAL CORPORATION; NEGLIGENCE, 2, 4, 14, 16; PRACTICE, 1; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 6; TRIAL, 8–10; WARRANTY, 1 WITNESS.

EXCEPTIONS.

1. A defendant filed a bill of exceptions, which the judge of the Superior Court disallowed on the ground that it was not conformable to the truth, and his certificate stated in detail the amendments which he deemed necessary. The defendant thereupon filed in the Supreme Judicial Court a petition to establish the truth of his exceptions, and a commissioner was appointed who reported in the defendant's favor. The defendant assented to the corrections and additions suggested in the judge's certificate, but the commissioner failed to incorporate them in the bill. At the hearing before the full court the defendant consented to have them so incorporated. *Held*, that it was the duty of the commissioner to consider the statements of the judge's certificate and that the bill of exceptions, amended in conformity thereto, should be established. *Commonwealth* v. *Joslin*, 482.
2. A bill of exceptions which states that a certain conversation was admitted in evidence, but does not show what it was, affords no ground of exception. *O'Brien* v. *Murphy*, 417.
3. In an action by the holder against the payee and indorser of four promissory notes, two letters of the defendant were admitted in evidence on his cross-examination as having some tendency to contradict his testimony. One of the letters was dated on the day when the last three notes were made payable, and the other letter was dated on the day when the first note was made payable. They were both apparently written before any one of the notes was actually payable, and they indicated that the defendant had some knowledge of the business of the maker of the notes, and was giving attention to his means of paying them, and that the defendant meant to see to it that the maker paid them if he had the means. *Held*, that the court could not say, on the statement in the exceptions, that it appeared that the judge erred in admitting the letters, or in the instructions given to the jury with reference to the effect of the letters upon the conduct of the plaintiff, in connection with other facts known to him and appearing in the evidence, which evidence was not set out in the exceptions. *Parker* v. *Kellogg*, 90.

See CONTINUANCE; EVIDENCE, 24, 28; INSURANCE, 3; INTOXICATING LIQUORS, 21, 22, 24, 25; MECHANIC'S LIEN, 1; TRIAL, 2, 9, 10.

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EXCHANGE.

See TRESPASS, 1; WARRANTY, 2.

EXECUTION.

1. A parcel of land was bounded on the east by a railroad, on the west by an embankment thirty feet wide, and on the north, when conveyed to A., ninety-three feet on E. Street. By subsequent arrangements between A. and the owner of the embankment, the position of the embankment at its northerly end by E. Street was moved about seventy-eight feet to the west, and a triangular lot bounded about seventy-eight feet on the north was conveyed to A. Subsequently the land was levied upon and sold on an execution against A. The officer's return on the execution described the land as bounded "northerly about ninety feet on E. Street," referred to A.'s original deed, and stated that his description was subject to any changes which had been made by agreement in the boundary lines of the embankment. *Held*, on a writ of entry by A. to recover the land, that the misdescription of the length of the boundary line on E. Street did not avoid the levy, although the levy was by sale and not by extent. *Ela* v. *Yeaw*, 190.
2. The statement in an officer's return of a levy and sale of land on execution, that he adjourned the sale "deeming it for the interest of all parties concerned," is sufficient, without saying also that he deemed it "expedient." *Ibid.*

See ATTACHMENT; POOR DEBTOR, 1.

EXECUTOR.

Upon an appeal from a decree of the Probate Court on an executor's account, this court will not consider the question whether commissions for services in the management and sale of certain land shall be charged against the proceeds of the land, or against a general fund in the executor's hands for administration under a clause of the will, which provides, after payment of debts, for payment of pecuniary legacies, the form of the account giving to the legatees no notice of such a question. *Sheffield* v. *Parker*, 330.

See APPROPRIATION, 2; ESTATE OF PERSONS DECEASED; INTEREST; PROMISSORY NOTE, 2; TRUST FUND.

EXPERT.

On a petition for the determination of damages for the taking of land for a sewer, a witness is an expert on the effect of sewers who has been admitted as an expert on values, and has testified on the general question without objection, and as such expert he may testify to what extent the taking of part of the land affects the value of the remainder. *Taft* v. *Commonwealth*, 526.

See EVIDENCE, 17–19.

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EXTRADITION.
See Fugitive from Justice.

FELONY.
See Writ of Error, 1.

FISH COMMISSIONER.
See Arrest; Evidence, 5.

FLATS.
See Oysters.

FORECLOSURE.
See Redemption, 4.

FOREIGN CORPORATION.
See Tax.

FORFEITURE.
See Deed, 2.

FORGERY.
See Evidence, 2; Trial, 9.

FRAUD.
See Beneficiary Association, 4; Husband and Wife, 2; Insolvent Estates; Laches; Principal and Agent, 2.

FRAUDS, STATUTE OF.
See Declaration of Trust; Principal and Agent, 4, 5.

FUGITIVE FROM JUSTICE.
A fugitive from justice, who has been surrendered by another State under the Const. U. S., Art. IV. § 2, cl. 2, upon a requisition from the Governor of this Commonwealth, may be tried here for an offence other than that specified in the requisition, although committed before the fugitive was demanded, without first giving him a reasonable opportunity to return to the State from which he was extradited. *Commonwealth* v. *Wright*, 149.

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GAS.

See EVIDENCE, 21.

GIFT.

See DONATIO CAUSA MORTIS; EVIDENCE, 1; HUSBAND AND WIFE, 1.

GUARANTY.

A. covenanted with his partner B. to compromise and settle all the debts of the firm as shown on an annexed exhibit or on the books of the firm, and B. released to A. all his interest in the assets. The agreement was made in contemplation of a possible settlement of the partnership affairs in insolvency, in which event the agreement was to be void. The agreement was of the same date as a stipulation of C., a third party, guaranteeing to B. the performance by A. of his covenant. The agreement and stipulation were apparently on the same paper, and both contracts were presumably part of a single transaction. C. was the principal creditor of the firm, and had no other inducement to execute the guaranty than the fact that he was a creditor. B. advanced to the firm, at different times, certain amounts entered on the books, some of which were entered with the word "loan" written on the same line. B. had of the firm cash and clothing to a certain amount, as appeared on the books, except that the prices for clothing were not carried out. B. accepted and relied upon the guarantee of C. as contained in the exhibit, and demanded both of A. and C. the sum claimed by him to be due thereunder. This sum did not appear on the exhibit, and was larger than the sum claimed by C. At the time of executing the agreement, B., on demand, divided with A. a sum which B. had collected of customers of the firm. *Held*, that C. was not liable under the guaranty for the advances by B. to the partnership. *Abercrombie* v. *Spalding*, 32.

HABEAS CORPUS.

See POOR DEBTOR, 1.

HABITUAL CRIMINALS.

See CONSTITUTIONAL LAW, 1; PRISON.

HEIRS.

See BENEFICIARY ASSOCIATION, 4; DEVISE AND LEGACY, 2-4; ESTATE OF PERSONS DECEASED.

HIGHWAY.

See CONSTITUTIONAL LAW, 7; EMINENT DOMAIN, 1; EVIDENCE, 13, 14; LAW OF THE ROAD, NEGLIGENCE, 15-17; NOTICE; PRINCIPAL AND AGENT, 3; SEWER; SIDEWALK; STREET.

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HUSBAND AND WIFE.

1. Even if a gift of personal property from a husband to his wife, considered as an attempt to make the same her sole and separate property, is invalid both under the Pub. Sts. c. 147, § 3, and at common law, yet, as administratrix of his estate, she has a good title thereto. *Stimpson* v. *Achorn*, 342.
2. If a wife places in her husband's hands her separate property, the presumption, in the absence of evidence that he receives it in trust for her, or of fraud practised upon her, is that he can use it as his own. *Clark* v. *Patterson*, 388.
3. If a married woman lends property to her husband and takes from him an obligation indorsed by his partner, the obligation is provable, if at all, only against the separate assets of the insolvent estates of the signers, and she has no claim against the assets of the firm. *Ibid.*
4. A note given to a wife by a partnership of which her husband is a member is void as between the original parties, and equity cannot afford relief. *Ibid.*

See Beneficiary Association, 1; Devise and Legacy, 2, 4; Evidence, 1; Polygamy; Promissory Note, 5; Tenants in Common.

IMPLIED GRANT.

See Landlord and Tenant, 4, 7, 9.

IMPRISONMENT.

See Poor Debtor, 1; Prison; Writ of Error, 2.

INDEMNITY.

See Contract, 6; Pleading.

INDICTMENT.

See Breaking and Entering Buildings; Complaint; Evidence, 2, 5, 6, 9–11; Intoxicating Liquors, 8, 13; Polygamy, 1; Practice, 2; Trial, 8, 9; Variance; Verdict; Writ of Error.

INDORSEMENT.

See Promissory Note, 6–8.

INFANT.

See Equity, 1; Evidence, 10; Intoxicating Liquors, 6–9.

INHABITANT.

See Tax.

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INJUNCTION.

On a bill in equity to restrain a threatened eviction of the plaintiff by the owner of the fee, it appeared that the plaintiff was a sublessee under a lease assented to by the defendant's predecessor in title and binding on the defendant; that it would not expire for over three years from the filing of the bill; and that the plaintiff had been injured and was threatened with complete eviction when the bill was filed. *Held*, that the plaintiff should not be confined to recovering damages on the ground that the injury of an injunction to the owner would be incommensurate with the benefit to the plaintiff, and that an injunction should issue. *Lynch* v. *Union Institution for Savings*, 394.

See EQUITY, 2, 13; LANDLORD AND TENANT, 9, 11; TRADEMARK.

INSOLVENT ESTATES.

A. borrowed a certain sum of B., a broker, giving him a promissory note therefor and assigning to him as collateral security certain shares of stock. The note provided that the holder of the stock "has authority to sell, transfer, or hypothecate said collateral for his own use." The note was renewed from time to time, and A. finally paid it, upon B.'s representation that he had the certificate of the stock in his possession and his promise to send it to A., which he did not do, but on that day he failed in business, and made an assignment. In fact, B. without A.'s knowledge pledged the stock for his own purposes on the day when he received it from A., and it was sold by the pledgee after B.'s assignment. B. filed his petition in insolvency, and received his discharge; and A. proved his claim and received his dividend. *Held*, in an action by A. against B. to recover the amount so paid by the former, that the disposition of the stock by B. was not fraudulent, within the meaning of the Pub. Sts. c. 157, § 84, or of the St. of 1885, c. 353, § 6; and that the action was barred by the discharge in insolvency. *Wilson* v. *Hawley*, 250.

See EQUITY, 6; HUSBAND AND WIFE, 3.

INSTRUCTIONS.

See CONTRACT, 3; EMINENT DOMAIN, 2, 3; EMPLOYERS' LIABILITY ACT, 10; EVIDENCE, 25; EXCEPTIONS, 3; INTOXICATING LIQUORS, 21, 22, 24, 25; LAND DAMAGES; OLEOMARGARINE, 3; REVIEW, 1; SEWER, 3; TRIAL, 1–3, 9.

INSURANCE.

1. A building and machinery used for generating electricity for electric lighting were insured against loss or damage by fire, and the jury found that the fire caused a "short circuit" of the electric current, which resulted in great damage to the machinery in a part of the building not reached by the fire. *Held*, that the injury to the machinery caused in this way was a

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"loss or damage by fire," within the meaning of the policy. *Lynn Gas & Electric Co.* v. *Meriden Ins. Co.* 570.

2. In an action on a policy of insurance for one year from September 8, 1890, at noon, it appeared that the application was made out on that day for the plaintiff by an insurance agent, not an agent of the defendant, and was forwarded to one C., the defendant's agent at O., whom it reached at about noon on September 9. The property intended by the plaintiff to be insured had been burned earlier on the same day. C. made out the policy, and after a delay of a few days forwarded it. The property was described in the policy following the application as grain "contained in the Elevator Building of the Ogdensburg Terminal Company at O., N. Y." On September 8, there were two elevators at O., both operated by the Ogdensburg Terminal Company; one new, owned by it, the other older, owned by a railroad company, but then let to the Terminal Company. The latter, which contained the plaintiff's grain, was burned on the 9th, as C. knew; and C. testified that that elevator was known and distinguished as the Railroad Company's elevator, and the other as the Terminal Company's elevator. *Held*, that the court rightly directed a verdict for the defendant. *Mead* v. *Phenix Ins. Co.* 124.

3. The plaintiff's exception to the introduction of evidence by the defendant was *held* to be immaterial by the judge's directing a verdict for the defendant. *Ibid.*

4. A policy of insurance upon a church built of wood provided that the policy should be void if without the assent in writing or in print of the company "the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk." While a naphtha torch was being used to burn off the old paint preparatory to repainting, the building caught fire and was entirely consumed. The question was whether a change of this kind, increasing the risk with the knowledge, agency, and consent of the insured, was an alteration of "the situation or circumstances affecting the risk" within the meaning of the policy. *Held*, that as the change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by fire, the change of the condition was sufficiently long continued to be deemed a change in "the situation or circumstances affecting the risk." *First Congregational Church* v. *Holyoke Mutual Fire Ins. Co.* 475.

5. The word "kept," as used in a policy of insurance which provides that it shall be void if certain oils and burning fluids shall be kept on the premises, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time. *Ibid.*

6. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions to the effect that the policy shall be void if, without the assent in writing or in print of the company, naphtha or other oils or burning fluids shall be "used by the insured on the premises insured," should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. Hence, where

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paint was removed by the use of a naphtha torch from the outside of a building covered with soft pine sheathing tongued and grooved and put on horizontally, and the weather was hot and dry and the boards shrunken so that in some places there were cracks, and the building caught fire and was entirely consumed, the questions for the jury are, "Whether the company, if familiar with the condition of the building and the methods usually adopted in making repairs, should have contemplated when it issued the policy that the insured would burn off the paint at such a time and in such a way as it did? Was such a use of naphtha a reasonably safe and proper way of making repairs on the building under the circumstances?" *First Congregational Church* v. *Holyoke Mutual Fire Ins. Co.* 475.

See BENEFICIARY ASSOCIATION; EVIDENCE, 18, 19; PROMISSORY NOTE, 4.

INTENTION.

See COMPLAINT, 2; EVIDENCE, 11; INTOXICATING LIQUORS, 3–7, 9–12; NOTICE.

INTEREST.

A testator devised certain lands to his executors, in trust to sell and pay over a certain sum from the proceeds thereof to a college; the surplus, if any, over said sum he gave to his children. The executors sold the land and before making payment to the college lent the proceeds on interest. *Held*, that the interest earned by said proceeds belonged, after settlement with the college, wholly to the children. *Sheffield* v. *Parker*, 330.

See CONTRACT, 5; EQUITY, 10.

INTERNAL REVENUE.

See OLEOMARGARINE, 3.

INTOXICATING LIQUORS.

1. A retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, has no right to sell intoxicating liquor, knowing or believing that the purchaser intends to use it for other than medicinal, mechanical, or chemical purposes, even though the purchaser signs a certificate, in the form prescribed by the statute, falsely stating that he wants the liquor for one of the purposes for which it may lawfully be sold. *Commonwealth* v. *Joslin*, 482.

2. If a retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, sells intoxicating liquor, intending that it shall be used for other than medicinal, mechanical, or chemical purposes, the sale is nevertheless lawful provided the purchaser in fact buys for an authorized purpose. (KNOWLTON, J., dissenting.) *Ibid.*

3. In the criminal law "reasonable cause to know" is not equivalent to actual knowledge. *Ibid.*

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4. "Reasonable cause to know" is not equivalent to belief or knowledge; and when the government undertakes to prove that a retail druggist, holding a license of the sixth class under St. 1887, c. 431, has made illegal sales of intoxicating liquors, it is not enough for the government to prove that the defendant sold the same having reasonable cause to know or believe that they were bought for unauthorized purposes, but it must prove that the defendant made the sales actually knowing or believing that such was the fact. *Commonwealth* v. *Gould*, 499.

5. A retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, was indicted for exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same, and the government relied on evidence of sales made by the defendant to persons who signed false certificates, stating that they wanted the liquor for medicinal purposes, when they really wanted it for a beverage. *Held*, that, in order to find that the sales were unlawful, it was not sufficient for the jury to find that the defendant had "reasonable cause to know" that the liquor was really wanted for a beverage, but that they must find that the defendant did in fact have the guilty knowledge or belief. *Commonwealth* v. *Joslin*, 482.

6. A retail druggist or apothecary, holding a license of the sixth class under St. 1887, c. 431, is forbidden. by Pub. Sts. c. 100, § 9, cl. 4, to make any sale or delivery to a minor, "either for his own use, the use of his parent, or of any other person." This is a condition of his license within which the holder is bound to keep at his peril, and, if a sale has been made to a person who is in fact a minor, evidence offered for the purpose of showing good faith that the minor told the druggist or his clerk that he was of age is immaterial to the question of criminal liability, and should be excluded. *Ibid.*

7. A retail druggist or apothecary holding a license of the sixth class under St. 1887, c. 431, who in good faith intends that sales shall not be made to minors, and instructs his clerks accordingly, and uses reasonable diligence in the selection of his clerks and in securing obedience to his instructions, is not criminally responsible for the act of a clerk in selling intoxicating liquor to a minor, whether such clerk makes an honest mistake or wilfully disobeys his employer's orders. *Ibid.*

8. At the trial of an indictment charging the defendant, a retail apothecary, holding a license of the sixth class under St. 1887, c. 431, with making unlawful sales of intoxicating liquor to a minor, the evidence tended to show that the minor was an express messenger; that he was accustomed to carry blanks torn from the certificate-book kept at the defendant's store to persons who would fill out and sign them, and give him money; that he would then carry the money and the signed certificates to the shop, receive liquor there, and take it to the purchasers; and that he had thus received it of the defendant personally and of his clerks. *Held*, that the delivery of intoxicating liquors to a minor, though acting as the agent of a disclosed principal, was forbidden by Pub. Sts. c. 100, § 9, cl. 4, and that the law in this respect was not changed by St. 1887, c. 431. *Ibid.*

9. A retail druggist, who holds a license of the sixth class under St. 1887, c. 431, is bound at his peril to keep within the condition of his license that

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no sale or delivery shall be made to a minor "either for his own use, the use of his parent, or of any other person," (Pub. Sts. c 100, § 9, cl. 4,) and such a sale or delivery is illegal even if the purchaser had the appearance of being of full age and even though the sales were made to him in the honest belief that he was an adult. *Commonwealth* v. *Gould*, 499.

10. The certificate of a purchaser of intoxicating liquor given, in due form, to a retail druggist who holds a license of the sixth class under St. 1887, c 431, stating that the liquor is wanted for medicinal purposes, even though the certificate is accompanied by the prescription of a physician which calls for the liquor, does not legalize the sale if the liquor is really bought to be used as a beverage and is sold by the druggist with the knowledge or belief that it is bought for that purpose. *Ibid*

11. If a sale of intoxicating liquor is made by a retail druggist who holds a license of the sixth class under St. 1887, c 431, upon a certificate, in due form, stating that the liquor is wanted for an authorized purpose, and if the purchaser in fact wants it for that purpose the sale is lawful even though the druggist sells with guilty intent, believing that the liquor is wanted for an unauthorized purpose *Ibid.*

12. In order to prove that a retail druggist holding a license of the sixth class under St. 1887, c. 431, has made an illegal sale of intoxicating liquor, the government must prove, not only that the liquor was really bought for an unauthorized purpose, but also that it was sold by the druggist with guilty knowledge or belief. *Ibid.*

13. At the trial of an indictment against a retail druggist, holding a license of the sixth class under St. 1887, c. 431, for the illegal exposing and keeping for sale of intoxicating liquors, the government relied upon evidence of illegal sales, and proved that numerous sales of small quantities of liquor had been made to various persons upon certificates stating that they wanted the liquor for medicinal purposes. Some of these purchasers were then permitted to testify, for the government, as to the real purpose for which they had bought the liquor, their evidence having a tendency to show that they really wanted it for a beverage, and that their certificates were false and fraudulent. *Held*, that, although the witnesses might have declined to answer the questions on the ground that their answers might tend to criminate themselves, the defendant could not avail himself of this objection. *Held*, *also*, that the evidence was competent to show that the liquor was in fact wanted for an unlawful purpose, and rightly admitted. *Held*, *also*, for the same reason, that the testimony of witnesses, who had bought at the defendant's store pints or half-pints of whiskey or rum, ostensibly for medicinal purposes, from ten to eighteen times during each of the six months covered by the indictment, that during the same period they had bought elsewhere an equal amount of liquor in similar quantities, was rightly admitted, although it did not appear that the defendant had any knowledge of purchases made elsewhere. *Held*, *also*, that the evidence of a witness for the government who was acquainted with these purchasers, and had seen each frequently during the period covered by the alleged illegal sales, that throughout that period they all appeared to be in good health, was competent either to show that the liquor was in fact wanted

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for an unlawful purpose, or to show guilty knowledge or belief on the part of the defendant, and was rightly admitted. *Commonwealth* v. *Gould*, 499.

14. The provisions of the Pub. Sts. c. 100, § 12, forbidding any person licensed to sell intoxicating liquors and to place or maintain screens or other obstructions in such a way as to interfere with a view of the business conducted upon the premises, apply to licensees of the sixth class, as well as to all other licensees. *Commonwealth* v. *Brothers*, 200

15. A complaint against a licensee of the sixth class, for the unlawful keeping for sale of intoxicating liquors, need not aver that the provisions of the Pub. Sts. c. 100, § 12, forbidding any licensee to place or maintain screens or other obstructions in such a way as to interfere with a view of the business conducted upon the premises, have been violated. *Ibid.*

16. It is not necessary to aver in a complaint against a licensee, for the unlawful keeping for sale of intoxicating liquors, or to prove at the trial, that the licensing board had required the defendant to remove the blinds and curtains upon the licensed premises. *Ibid.*

17 At the trial of a complaint against a licensee, for the unlawful keeping for sale of intoxicating liquors, the fact that the windows of the licensed premises open upon private grounds does not render it incompetent to prove that the view through the windows, or one of them, was obstructed. *Ibid.*

18. At the trial of a complaint against a licensee of the sixth class, for the unlawful keeping for sale of intoxicating liquors, there was evidence that two police officers visited the defendant's drug store in the evening of the day named in the complaint, and found in a back room connecting with the store, called the "back shop," two men sitting, with the gas turned down; that, after turning on the gas, they also found several prescription glasses standing upon a shelf over a sink, and smelling of liquor; that on the shelf near the glasses was a demijohn containing whiskey, and the shelf there was wet with whiskey and showed marks where glasses had been placed; that the officers also found in the cellar a keg containing cider, and on a box near the keg was a glass wet with cider, and the box was also wet with cider where the glass stood; that they also found bottles of ale, recently opened, with some ale in each bottle, and also other liquors in bottles and barrels in the cellar; that there were two windows in the back shop, upon one of which were blinds closed and a curtain pulled wholly down, and the other of which had no curtain, but the view to which was obstructed to some extent by a pile of boxes and barrels in the yard; that the officers called the defendant's attention to the condition of the prescription glasses, the shelf, and the demijohn in the back shop, and he made no reply; and that at other times near the date of the complaint persons were seen going into and coming out from the back shop under circumstances which might be deemed suspicious. *Held*, that the evidence was competent, and was sufficient to warrant a conviction. *Ibid.*

19. At the trial of a complaint against a licensee of the sixth class, for the unlawful keeping for sale of intoxicating liquors, it is not necessary to prove that cider found upon the defendant's premises on the day named in the complaint contained more than one per cent of alcohol. *Ibid.*

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20. If a druggist having a license of the sixth class, sells intoxicating liquors in violation thereof, it is not unconstitutional to impose upon him a penalty, in addition to providing by statute that his license shall be void. *Commonwealth* v. *Brothers*, 200.

21. At a trial of a complaint for the illegal keeping for sale of intoxicating liquors, the government introduced evidence, without objection, that drunken men were seen going into and coming from the defendant's premises at other times than that specified in the complaint; and the defendant introduced evidence that intoxicated persons came frequently upon his premises, which were unfenced from the public street upon which they opened. The judge submitted the whole evidence to the jury, with instructions that they might consider any of the evidence as to acts which occurred within thirty days prior to the date of the complaint tending to establish the charge therein. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Hurley*, 159.

22. At the trial of a complaint for the illegal keeping for sale of intoxicating liquors, there was evidence that the defendant, who was a woman and kept a grocery, upon her arrival at the police station after her arrest, took from her garments and threw away a lager beer bottle containing whiskey; that police officers found on her premises that day three bottles, in one of which there was half a teaspoonful of whiskey; that intoxicated persons were seen going into and coming from her premises at other times than that specified in the complaint; and there was other evidence not reported tending to establish the charge in the complaint. The judge declined to rule, as requested by the defendant, that there was not sufficient evidence to sustain the charge in the complaint, and that the defendant was entitled to an acquittal. *Held*, that the defendant had no ground of exception. *Ibid.*

23. At the trial of a complaint for the unlawful keeping for sale of intoxicating liquors, there was evidence that the defendant kept two stores, in which was a large stock of groceries; that, five years previously, he had a license for the sale of intoxicating liquors in one of the stores, but had none at the time of the complaint; that when he had the license the premises contained all the fixtures and paraphernalia of a bar-room, and remained unchanged materially at the date of the complaint; that at the latter date a police officer visited the premises with a search-warrant, and found the defendant there; that, as the officer passed in back of the bar, the defendant went into his office, and the officer heard the click of the safe as if some one was closing it; that the officer asked the defendant to open the safe, and he said he had no key, and left the premises; that he returned subsequently, and, upon another request by the officer and after some hesitation, opened the safe, which was found to contain a large quantity of intoxicating liquors in flasks which were free from dust; that the officer found in this store a number of empty lager beer bottles, and also whiskey glasses and two empty jugs smelling strongly of whiskey; that there was a drawer under the bar with a bowl of sugar in it and a spoon in the bowl, and the edge of the drawer was wet and smelt of whiskey; that the officer also searched the other store, and found in the cellar of the premises a large

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quantity of liquors in barrels and casks, and the faucets in the barrels, the measures and pumps all showing recent use; and that on several occasions a meal bag containing what appeared to be a jug was seen to be carried from one store to the other. *Held*, that the evidence was sufficient to warrant a verdict of guilty. *Commonwealth* v. *Canny*, 210.

24. At the trial of a complaint for the unlawful keeping for sale of intoxicating liquors, it appeared that the defendant kept two stores, in which was a large stock of groceries; that a large quantity of intoxicating liquors was found in each place, some in flasks concealed in the safe in one store, and some in barrels and casks in the cellar under the other store, and that the defendant previously had a license, which had expired, to sell intoxicating liquors at the former store, in which the usual fixtures and paraphernalia of a bar-room were contained in an unchanged condition at the date of the complaint. The judge refused to rule, as requested by the defendant, that, "in considering the evidence, the jury are to presume that the goods in question were kept for legal purposes, unless the government has shown to the contrary"; and instructed the jury, in effect, that they must be satisfied beyond a reasonable doubt, on the evidence, that the liquor was kept by the defendant with the intent to sell it, either by himself or by his servants, in violation of law, or the verdict must be not guilty; and that there was no presumption that the liquor found in the stores of the defendant was kept by him with intent to sell it in violation of law. *Held*, that the defendant had no ground of exception. *Ibid.*

25. At the trial of a complaint for the unlawful keeping for sale of intoxicating liquors, there was evidence that the defendant kept a store, which was in a block occupied by other tenants, and adjoining his store was an unoccupied store, each having a door opening into a common entry-way in the rear; that during the time covered by the complaint a large quantity of liquors was found in an ice-chest in the unoccupied store; that on another occasion a quart of whiskey in a bottle was found by an officer, in the defendant's absence, in the cellar of the building, into which a stairway led from the defendant's store; that the defendant lived with his grandmother, about one hundred or one hundred and fifty yards from his store, that her house was searched by the police, who found concealed under a trap door in the floor of the kitchen two quart bottles containing whiskey and two empty jugs smelling of whiskey; that the defendant went back and forth from his store to this house when he took his meals, and also at other times; that on one occasion a pint bottle half filled with lager beer, and eight empty lager beer bottles, and on another occasion a glass which smelt of whiskey, were found in the defendant's store, and in his presence; and that on different occasions men under the influence of liquor were seen in and about the defendant's premises. The judge refused to rule, as requested by the defendant, that there was not sufficient evidence to justify a verdict of guilty. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *McKenna*, 207.

See COMPLAINT, 2; EVIDENCE, 3, 4, 9-11; LANDLORD AND TENANT, 4; VARIANCE.

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INVITATION.

See Breaking and Entering Buildings, 2; Negligence, 8, 14.

JAIL.

See Poor Debtor, 1; Prison.

JUDGE.

See Conversion, 1; Donatio Causa Mortis; Eminent Domain, 2, 3; Employers' Liability Act, 10; Equity, 8–10, 13; Evidence, 17, 19, 28; Negligence, 3; Promissory Note, 5; Trial, 4, 6, 8; Verdict.

JUDGMENT.

See Contract, 3; Review.

JURISDICTION.

See Equity, 1.

JURY.

If a sufficient number of the jurors summoned to try a petition for an assessment of damages for the taking of land for a railroad are not present, it is no objection to talesmen returned by the sheriff under the provisions of the Pub. Sts. c. 49, § 41, that they are not residents of the nearest towns to that in which the land lies, if they are qualified and liable to serve in that county. *Wellington* v. *Boston & Maine Railroad*, 185.

See Contract, 3; Evidence, 27; Intoxicating Liquors, 5; Landlord and Tenant, 8; Mechanic's Lien, 1, 3; Negligence, 2, 3, 9, 16, 17; New Trial; Notice; Sewer, 1; Sidewalk; Trial, 1–6; Variance; Verdict; Warranty, 1.

LACHES.

The principal and latest transaction which the plaintiff shareholders of a corporation sought in equity to set aside was a sale on July 17, 1888, by the defendant corporation, to two defendant shareholders. The bill was filed on October 9, 1889. The number of shareholders was small, their relations to each other were such that the business of the corporation was in a general way known to all, the action of the two defendant shareholders was open and unconcealed, and no stockholder made objection to their participation in formal action for the corporation in transactions with themselves until after innocent third persons had acquired rights in the property and the two defendant shareholders had incurred new obligations with reference thereto. *Held*, that the inference of laches was justified. *Snow* v. *Boston Blank Book Manuf. Co.* 325.

See Equity, 1, 5.

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LAND DAMAGES.

At the trial of a joint petition by three persons before a sheriff's jury, for an assessment of damages sustained by each petitioner by the taking of his land for railroad purposes, the petitioners contended that each could recover the value of his own land taken and the damages occasioned to his other lands in the same village by the whole taking; and they were allowed to introduce evidence upon this theory. The respondent asked instructions based upon a contrary theory, which were refused. *Held*, that the verdicts must be set aside. *Wellington* v. *Boston & Maine Railroad*, 185.

See EVIDENCE, 7, 8, 16, 17; EXPERT; JURY; NEW TRIAL; SEWER, 2, 3.

LANDLORD AND TENANT.

1. A lessee's covenant to save the lessor harmless "from any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering from the premises so leased," does not have the effect to give to the lessee the sole occupancy of the sidewalk in front of the lessor's building, or bind him to keep the same in general repair; and the rule of law as to a landlord's responsibility for defects in the approach to a stairway used by several tenants is applicable. *Leydecker* v. *Brintnall*, 292.
2. In an action for personal injuries occasioned to the plaintiff by falling on one of the approaches to a building leased by the defendant, the latter's request for an instruction, that the mere fact that he retained the use of one or two rooms in the building did not conclusively determine that he had control of the approaches, was held to be rightly refused. *Ibid.*
3. An owner of land bounding on a street cannot escape liability for neglect to keep in proper repair the approaches to his tenement, which is let to tenants, by saying that he did not know where his boundary line was, or that he did not know that the approaches were out of repair. *Ibid.*
4. In an action for arrears of rent due under a lease, a tenant who remains in possession until the end of his term cannot recoup, as for an eviction, or a breach of the implied covenant for quiet enjoyment, the damages alleged to have been occasioned by the landlord during the term entering upon the demised premises for breach of the covenants of the lease by the tenant, and bringing an action to eject the tenant, who recovered judgment therein, and with knowledge that the premises were of value to the tenant only for his business of a common victualler and seller of liquors, causing the license commissioners to refuse him a license for the sale of liquors, and also causing his license as a common victualler to be taken from him wrongfully; nor can the tenant maintain an action of contract against the landlord upon the same facts. *International Trust Co.* v. *Schumann*, 287.
5. If a lessor insists on the validity of his lease to the lessee for the purpose of collecting the rent reserved in it, he cannot treat the lease as invalid for the purpose of avoiding his implied covenant for quiet enjoyment; and

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if he takes judgment for the full amount of a year's rent without giving credit for rents received from other tenants, he cannot claim that such letting by him to other tenants was for the lessee's account. *Riley* v. *Hale*, 240.

6. The lessee's omission to avail himself by way of recoupment of the lessor's covenant for quiet enjoyment does not debar him from maintaining an action on such covenant. *Ibid.*

7. Where the relation of landlord and tenant exists, the lessor is liable on his implied covenant for quiet enjoyment; if he intentionally puts it out of his power to deliver possession of the premises to the lessee, without the lessee's consent, the lessor's act is of the same nature as an eviction. If no rent has been paid the measure of damages is the difference between the agreed rental and the actual value; but where the lessee has been compelled to pay rent during the period of exclusion, the amount so paid is to be added, otherwise his actual loss by reason of the breach of the implied covenant will not be made good. *Ibid.*

8. A. executed a lease of certain premises to B. from May 1, 1880, to April 30, 1883. B. not having taken possession, A. brought an action against him on October 21, 1881, and recovered judgment for one year's rent. In an action by B. against A. on A.'s covenant for quiet enjoyment, B. introduced in evidence, without objection, leases executed by A. to other tenants for the period from May 12, 1880, to April 30, 1881, and also from May 1, 1881, showing the rent agreed to be paid for those periods; and was also allowed to introduce, under objection, a lease by A.'s grantee to the same tenants from May 1, 1882, to April 30, 1884, showing the rent to be paid for that period. The ground of objection at the trial to the last lease was not stated, but certain grounds of legal distinction between that and the other leases were urged at the argument in this court. *Held*, that the first ground of distinction, that the defendant was not a party to the last lease, was immaterial, as the purpose was merely to show the rental value of the premises for the plaintiff's term; that the second ground, that there was evidence that the entire rent reserved was not paid, did not affect the competency of the evidence, but was only a matter for comment to the jury; and that as to the third, that the lease covered a period one year later than the term of the lease to the plaintiff, there being a gradual advance of the rents, it was to be assumed that, as the lease was admitted to show the rental value till April 30, 1883, proper instructions were given if asked for. *Ibid.*

9. The defendants were the owners of a large building, used for business purposes, extending north and south between two parallel streets, and having entrances and windows on both. The plaintiffs, a firm of commission merchants, were the lessees of the second, third, fourth, and fifth floors of the east half of said building, each floor being lighted by windows in the ends, and by four windows in the east side, about midway between the two streets, opening into a rectangular light and air space or well twenty-seven and one half feet long by six and one half feet wide on the defendants' land, which space had been made by setting back the wall of the building from the east side line of the lot; and owing to the existence

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of a similar set-back in the wall of the adjoining building, the distance from said side windows to the opposite wall was about seventeen feet. Each side window had two iron shutters, which opened out into the open space and swung back against the wall. The plaintiffs used that part of the second floor opposite the side windows for the exhibition and sale of goods. The lease contained no mention of the open space, and no covenants whatever on the part of the lessors; but, in order that the plaintiffs might have the full enjoyment of the premises as leased, it was necessary that they should have the full and undisturbed use of the side windows for light and air, and of the open space for opening and closing the shutters. Some months before the expiration of the plaintiffs' lease, the defendants leased the whole building, subject to two unexpired leases, one of which was the plaintiffs', to J. and J., giving them immediate possession of the basement with permission to erect therein a large electric light plant and to build a sufficient chimney in connection therewith. J. and J. at once proceeded to build said plant, and erected large wrought-iron pipes or chimneys in the open space above described. The noise and dust caused by the work greatly annoyed and injured the plaintiffs in their business, the pipes or chimneys prevented to some extent the opening of the iron shutters, and obstructed the light so as to interfere materially with their business, and the construction and operation of the electric plant seriously affected the plaintiffs' ability to get insurance on their goods. *Held*, in a suit in equity brought to enjoin the defendants from disturbing the plaintiffs, or permitting them to be disturbed, in the quiet enjoyment of the demised premises, that there was an implied grant or demise of a right to the light and air passing through the open space or well. *Held*, *also*, that the acts of J. and J. constituted a nuisance or substantial interruption of the plaintiff's right to quiet enjoyment; but *quære* whether they amounted to an eviction. *Case* v. *Minot*, 577.

10. If a landlord authorizes his tenant to do on the demised premises wrongful acts which injure another, and this result is the natural and probable consequence of the acts so authorized, the landlord is liable therefor. *Ibid.*

11. The plaintiffs were the lessees of the four upper floors of the east half of a building owned by the defendants as trustees. The first floor of the building and the basement were leased to B. and T., under a lease which was not to expire until a year later than the plaintiffs'. Some seven months before the expiration of the plaintiffs' lease, the defendants, in order to enable themselves to make a lease of the whole building to J. and J. and give them possession of the basement, bargained with B. and T. to vacate the basement and accept other rooms in place of it, and to permit the enlargement of the chimney serving the engine-room. This agreement was put in writing, and, besides other considerations therefor connected with the use of the premises, it was stipulated that $10,000 should be paid to B. and T. in cash. On the same day the defendants executed a lease to J. and J. of the whole building then occupied in part by the plaintiffs and in part by B. and T., which lease expressly provided that the lessees took subject to the lease to B. and T. as modified by

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their said agreement, and to the lease to the plaintiffs. It also provided as follows: "Permission is granted for the lessees to put into the basement of the building boilers, dynamos, and other appurtenances sufficient to supply power, light, heat, etc. to the neighboring buildings occupied by them, and to build a chimney of adequate size in connection therewith." A few days later J. and J. went into possession and proceeded to put in said electrical works, by the construction of which the plaintiffs were injured. One of the defendants and their active trustee testified, in a suit in equity to enjoin the defendants from disturbing the plaintiffs or permitting them to be disturbed, that he could do nothing to stop the work except to say to J. and J. that he would be glad to have anything done to prevent annoyance, and in their answer the defendants averred that J. and J. were "regarding the terms and provisions" of their lease. *Held*, that the defendants had authorized the doing of the acts complained of. KNOWLTON & MORTON, JJ. dissented from that part of the opinion holding the defendants legally responsible for the erection of the chimney by J. and J. *Case* v. *Minot*, 577.

See TRIAL, 6.

LAW AND FACT.

See EVIDENCE, 17; INTOXICATING LIQUORS, 18, 22–25; NEGLIGENCE, 2, 3, 9, 12, 17; NOTICE; SEWER, 1; TRIAL, 4, 6; VARIANCE.

LAW OF THE ROAD.

1. The law of the road, Pub. Sts. c. 93, §§ 1, 4, does not apply to a highway formed by the junction of two streets which cross each other diagonally. *Norris* v. *Saxton*, 46.
2. In an action for damages occasioned by a collision, in a public street, it appeared that both teams were left unattended, and that, at the time of the collision, no persons met each other travelling with the vehicles which collided. The plaintiff requested the judge to instruct the jury, first, that if the defendant's team, passing along unattended, came in contact with the plaintiff's team, which was left standing at the side of the street on the left hand of the defendant's team as it approached, that would be *prima facie* evidence of the defendant's negligence; secondly, that the burden would be on the defendant to satisfy the jury that he was not negligent. *Held*, that the provisions of the Pub. Sts. c. 93, § 1, which relate to persons "travelling with carriages," etc., had no application, and that the burden of proof remained on the plaintiff as well after as before the introduction of *prima facie* evidence of negligence; that a *prima facie* case calls for evidence on the other side to meet it; and that if evidence of equal weight is introduced so that the two sides are in even balance, the plaintiff fails. *Broult* v. *Hanson*, 17.

LEASE.

See LANDLORD AND TENANT.

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LEGACY.
See DEVISE AND LEGACY.

LEGISLATURE.
See CONSTITUTIONAL LAW; EMINENT DOMAIN.

LEVY.
See EXECUTION.

LICENSE.
See EVIDENCE, 10, 11; INTOXICATING LIQUORS, 1-20; MUNICIPAL CORPORATION; NEGLIGENCE, 8; OYSTERS.

LIEN.
See CHATTEL MORTGAGE; EQUITY, 2; MECHANIC'S LIEN.

LIGHT AND AIR.
See LANDLORD AND TENANT, 9.

LIMITATIONS, STATUTE OF.
See EQUITY, 1, 5.

LOBSTERS.
See ARREST.

MAIL.
See ARBITRAMENT AND AWARD; TRADEMARK.

MANDAMUS.
See STREET, 2.

MARRIED WOMAN.
See DEVISE AND LEGACY, 2, 4; HUSBAND AND WIFE; PROMISSORY NOTE, 5, 6.

MASTER AND SERVANT.
See EMPLOYERS' LIABILITY ACT; EVIDENCE, 26, 27; NEGLIGENCE, 1, 3-7, 11; PLEADING; TRIAL, 7.

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MASTER IN CHANCERY.

See CHATTEL MORTGAGE.

MECHANIC'S LIEN.

1. If, in a petition to enforce a mechanic's lien for the labor furnished pursuant to a written entire contract to furnish the labor and materials for plumbing certain houses, an issue submitted to the jury and answered by them in the negative is identical with that for which it was substituted with the assent of the parties, the party aggrieved by the verdict has no ground of exception. *Hawkes* v. *Spraker*, 13.
2. B. made a written contract with C. to furnish labor and materials for the construction of a house on B.'s land. A. made an oral contract with C. to furnish all the labor and materials in plumbing the house for an entire sum. Shortly after A. commenced work C. failed, and A. and C. mutually rescinded their contract. A. offered to complete the contract at the expense of B., but B. refused. No notice in writing was given by A. to B., according to the Pub. Sts. c 191, § 8. *Held*, that, as the labor was performed and furnished under an entire contract for an entire price, and as A. had not lost his right to recover against C. by reason of the failure to complete the contract, and as this labor had been a benefit to B. and as the Pub. Sts. c. 191, § 2, permit the labor to be separated from the materials for the purpose of enforcing a lien, A. might enforce a lien against B.'s land for what the labor was reasonably worth, not exceeding the entire price agreed upon in the contract after deducting any damages suffered by B. from the non-completion of the contract. *Moore* v. *Erickson*, 71.
3. A mechanic's lien cannot be maintained if there is no evidence that portable ranges for which the lien is claimed "were to be furnished as parts of the several houses in which they were put," or were "applied so as to constitute parts of the buildings," within the meaning of *Turner* v. *Wentworth*, 119 Mass. 459, 465. KNOWLTON & LATHROP, JJ. dissented, on the ground that there was evidence for the jury. HOLMES & BARKER, JJ. thought that the test of what are materials used in the erection of a building, within the meaning of the Pub. Sts. c. 191, § 1, is structural connection with the building, and so agreed with the majority. *Boston Furnace Co.* v. *Dimock*, 552.

See EQUITY, 2.

MILK.

1. The authority of the Board of Railroad Commissioners, under the Pub. Sts. c. 112, §§ 192, 193, 194, is not to consider the general subject of rates, but to "ascertain at what rates facilities for the carriage of milk under contract or in large quantities are furnished by the railroad corporation," and to compare them with the tariff for the carriage of milk by the can,

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to fix rates by the can "fairly proportionate with such contract or large quantity rates." The order when made is to have the force and effect of a criminal statute, which calls for strictness and regularity in proceedings under it. *Littlefield* v. *Fitchburg Railroad*, 1.

2. In the record of hearings before the Board of Railroad Commissioners on a petition asking for the revision and fixing of tariff rates for the forwarding of milk over a railroad, there was nothing to indicate that the railroad had notice of the petition, or an opportunity of being heard before the board. In an action against the railroad to recover a penalty under the Pub. Sts. c. 112, § 194, for non-compliance with the order of the board, there was no allegation in the declaration to show that the defendant had such notice or opportunity to be heard. *Held*, on demurrer, that, while from what occurred at the argument the court might suppose that the defendant was before the commissioners, yet it could not go outside of the record before it, and that the order was invalid for want of a notice to the defendant. *Ibid.*

3. In a petition to the Board of Railroad Commissioners for the revision and fixing of tariff rates for the forwarding of milk over a railroad, there was nothing to show to what railroad the petition referred, or in what part of the State, or in what direction the petitioners desired to forward milk, or, except by inference, that they desired to forward it anywhere. The petitioners described themselves as producers of and dealers in milk, but besides that there was nothing to show what interest they had in the subject to which the petition related. The order of the board recited that the petition was signed by residents of seven towns mentioned, but did not state to what railroad it related, although there was language from which it might be inferred that a former proceeding of a similar character against the same defendant was intended to apply. The order did not expressly state to what place the milk was to be carried at the rate fixed, although Boston was apparently meant; and the only designation of the places from which milk was to be carried was "the stations covered by the present petitions," which was supposed to mean the stations in the towns where, according to the recital in the order, the petitioners resided. From some of these towns another railroad ran to Boston, and it was not stated whether the order was to apply to transportation over that railroad or not. *Held*, that the proceedings were not sufficiently regular and formal, and the order was not sufficiently explicit, to be made a foundation for the recovery of the penalties prescribed by the Pub. Sts. c. 112, § 194. *Ibid.*

MILL AND MILL-OWNER.

See PARTITION.

MINOR.

See EQUITY, 1; EVIDENCE, 10; INTOXICATING LIQUORS, 6–9.

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MISTAKE.

See DEED, 1; EQUITY, 8.

MORTGAGE.

See CONTRACT, 5; REDEMPTION; WRIT OF ENTRY.

MORTGAGE OF PERSONAL PROPERTY.

See CHATTEL MORTGAGE.

MOTION.

See RULES OF COURT.

MOTION TO DISMISS.

See COMPLAINT, 1.

MOUNT HOPE CEMETERY.

See CONSTITUTIONAL LAW, 2-6.

MUNICIPAL CORPORATION.

The city council of Boston may lawfully forbid public selling in the streets; and an ordinance of the city which provides that no person shall sell, in any street or from any building, any goods or article to any person on the street, except in accordance with a permit from the superintendent of streets is reasonable, constitutional, and valid; and the fact that the party complained of has a license as a peddler from the Commonwealth is immaterial. *Commonwealth* v. *Ellis*, 555.

See CONSTITUTIONAL LAW, 2-7; PRINCIPAL AND AGENT, 3.

MUTUAL AID SOCIETY.

See BENEFICIARY ASSOCIATION.

NATIONAL BANK.

See TAX.

NEGLIGENCE.

1. A purchaser of cotton in bales is not bound to have the bagging inspected with a view to ascertaining whether it is strong enough to hold when the hooks are caught into the bagging for the purpose of aiding in moving the bales. *Garragan* v. *Fall River Iron Works Co.* 596.

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2. In an action for personal injuries occasioned to the plaintiff by an elevator which the defendants used to get their goods to their premises, the plaintiff's evidence was confused and inconsistent, in that he stated that he did not perceive that the elevator was in motion until he was injured, and also that he saw two of the defendant's servants start the elevator. These servants were not fellow servants with the plaintiff, who was a teamster employed by a carrier, and not an employee of the defendants. *Held*, that however much the plaintiff may have contradicted his own statements, and however dull and inconsistent he may have been as a witness, it was for the jury to weigh his statements and find the facts. *Leavitt* v. *Leavitt*, 355.
3. In an action for personal injuries by A. against B, it appeared in evidence that B. had an arrangement with C. by which C. had charge of a room in B.'s factory in which room A. was at work. C. hired and paid the men, and B. paid C. so much a case for fitting the stock. B. furnished the machinery, including the machine on which A. was injured, power, and everything except labor, and, as B. testified, looked out for the room, though he did not explain the phrase. If the stock was not fit C. informed B., and B. testified that C. had full charge and assumed the responsibility. Whether B. exercised supervision over the work was not clear. He was often about the room and kept the machinery in repair through one D., B. testifying that the arrangement was that he should pay for the repairs, and that C. had the right, if repairs were needed, to go to D. and get a man, and had done so several times; that he himself had given orders to do so, and had sent out to have some of the machines repaired after something that C. had told him; that he relied on C. to examine the machinery; that he had the right to inspect the machine himself, and was often in the room; and that he never hired anybody to clean the machines, but supposed C. would do it, though he had no agreement with him. B. also spoke of C. as his foreman. C. testified that he was to look after the machines and have them repaired, but was doubtful whether or not at B.'s expense, and that he had usually notified B. of what was needed, but did not expect B. to inspect the machines as a part of the arrangement. The judge directed a verdict for B. *Held*, that A. should have been allowed to go to the jury, both on the count at common law and the count under the St. of 1887, c. 270, § 4. *Toomey* v. *Donovan*, 232.
4. In an action for personal injuries it appeared in evidence that for a part of three years before the accident the plaintiff had worked upon a machine like that upon which he was injured; that he was twenty-five years old at the time and of ordinary intelligence; and that he knew that there was no automatic guard on the machine and no way of preventing the head block from coming down if the machine was out of order. *Held*, that, having assumed the risk of operating the machine without a guard, the plaintiff could not now claim that one should have been put on. *Ibid.*
5. In an action for personal injuries it appeared in evidence that the plaintiff had worked before the accident for the defendant corporation, a railroad, at least two years, running all the time on the same division. One of the defendant's stations, at which the plaintiff had been a number of times by

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day and frequently by night, had a projecting awning, which had remained unchanged since the plaintiff had worked on the road and with which the plaintiff was familiar. All the principal stations on the road had similar awnings. On the night of the accident, which was dark and rainy, the plaintiff was on a car which came from another road, and which was higher than some cars and had a side ladder. The plaintiff had ridden on such cars before, not more than one in twenty of which was made with a ladder on the side, and on the average there would be one or two such cars in a freight train. The plaintiff started to get upon the ladder to go down, and in passing the station struck against the awning and was hurt. *Held*, that the defendant was not guilty of negligence in receiving and hauling such a car as a part of its train; that at common law the risk of the accident was one which the plaintiff must be held to have assumed, and that no remedy was given to him by the St. of 1887, c. 270, § 1, cl. 1. *Fisk* v. *Fitchburg Railroad*, 238.

6. In an action against a railroad company for personal injuries occasioned to the plaintiff by being thrown from a hand-car in consequence of his clothing being caught by the crank of the car while he was turning the same, there was evidence tending to show that the part of the crank which was taken hold of consisted of a wooden piece through which passed an iron bolt on which the wooden piece turned as the crank revolved; that this iron bolt passed through the arm of the crank, and projected on the other side in all an inch and a half; that the part which projected had a thread cut on it, and a nut screwed down to the arm, the nut being half an inch thick, and the threaded screw projecting an inch beyond the nut. The plaintiff had been in the employ of the defendant for several years as a section hand, and the hand-car on which he was injured had been in use for several days. *Held*, that while there was evidence that some other hand-cars had the end of the bolt welded, and others had the nut at the end of the handle, there was no evidence that a handle made as this one was with a threaded screw projecting beyond the end of the nut was not a well known device, and the fact that it was more dangerous than other devices, did not render the employer liable. *Carey* v. *Boston & Maine Railroad*, 228.

7. In an action against a railroad company for personal injuries occasioned to the plaintiff by being thrown from a hand-car in consequence of his clothing being caught by the crank of the car while he was turning the same, the declaration alleged that the pin or bolt became detached from the handle and then became entangled in the plaintiff's clothing, and that it became detached because it and other parts and attachments of the handle were insufficient and unfit for the use to which they had been applied, while the evidence was that while the plaintiff was turning the crank a bolt at the end of the crank took hold of his coat and threw him over and the car ran over him. *Held*, that there was a variance between the allegations and the proof. *Ibid.*

8. An employee of a railroad corporation, who is engaged in delivering a car to another railroad corporation upon the latter's tracks in the regular

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course of business between the two corporations, is not a mere licensee. *Turner* v. *Boston & Maine Railroad*, 261.

9. If an employee of a railroad corporation is injured by having his foot caught in a frog in the track of another railroad corporation, while engaged in delivering a car to the latter upon its tracks in the regular course of business between the two corporations, it is a question for the jury, in an action against the last named corporation for the injury, whether the defendant was negligent in leaving the frog unblocked, there being evidence that the defendant had assumed the duty of blocking all the frogs, and keeping them blocked, for the safety of its own employees, as required by the St. of 1886, c. 120. *Ibid.*

10. In an action against a railroad corporation for personal injuries occasioned to an employee of another railroad corporation, by having his foot caught in an unblocked frog in the track of the former corporation, while engaged in delivering a car to the latter upon its tracks in the regular course of business between the two corporations, it appeared that the frog was about twenty-eight feet distant from the end of a passenger station at a junction where the roads of the two corporations crossed each other. There was evidence from the section master in charge of the blocking of frogs at this place, from which it might be found that he had not noticed for three or four days whether the frog which caused the accident was blocked or not; and other men under him were not called as witnesses upon this point. It was also contended, from the appearance and testimony of the section master, that he was not to be believed when he testified that he had blocked this frog shortly before the accident; and it was further argued that other frogs near by were also left unblocked. *Held*, that it was open to the plaintiff to contend that, if this frog had ever been blocked at all, it had not been in that condition recently before the accident, and if not, that it might be inferred that the defendant or its agents or servants knew or ought to have known the fact. *Ibid.*

11. In an action against a railroad company for personal injuries, it appeared in evidence that the switchman had been sent to throw the switch as a flying switch was to be made; that the engine, with its head facing the cars, was backing and pulling the train along towards the switch; that it had slackened its speed, to let the brakeman pull out the pin and thus to uncouple the caboose car from the engine; that he had hold of the chain attached to the pin, but did not succeed in pulling it out, yet gave the signal for the engineer to start along; that the engineer started faster; that as soon as the engine passed the switch the switchman, without seeing that the caboose car was still coupled to it, threw the switch; and that the coupling held, the caboose car was pulled off the track and tipped over, and the brakeman was killed. The pin and the hole in the "stiff-shackle" through which the pin dropped were in good condition, and the reason why the brakeman could not pull it out was that the engine was pulling the train and he did not succeed in getting it out at the moment when the engine slackened its speed. *Held*, that the giving of the signal for the engineer to start faster before the pin was pulled out contributed

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directly to the accident; that the plaintiff, who was the brakeman's next of kin dependent, having failed to show that his acts did not contribute to the accident, could not recover under the St. of 1887, c. 270. *Browne* v. *New York & New England Railroad*, 247.

12. In an action against a railroad for personal injuries it appeared in evidence that at the place of injury, a station, there were two tracks. The plaintiff having been travelling from Boston on the westerly and outward track alighted on the easterly side, between the two tracks, and started to cross the easterly track, when he was run down by an incoming train. On the side toward which the plaintiff was going were the station and a flight of steps leading in the direction of the plaintiff's home. On the westerly side was a long platform opposite the station, extending to the highway. The gates at the end of the plaintiff's car were open on both sides. The plaintiff knew the premises, and walked back through the train to this car to cross the track, as others were in the habit of doing. He testified that, as he was going down the steps, he looked around and did not see anything; but it appeared that if he had looked before going upon the eastern track he could not have failed to see the approaching train in time to avoid danger. It was six in the evening, and the night was dark and misty, but there was a lighted headlight on the incoming engine. There was a rule of the road that a train should not pass another which was discharging passengers at a station, and the plaintiff knew that trains were not accustomed to pass. The plaintiff was not shown to have known of the rule, and it did not seem to be material except as bearing upon the defendant's negligence, which was admitted. *Held*, that the judge rightly directed a verdict for the defendant. *Connolly* v. *New York & New England Railroad*, 8.

13. A person is not warranted in assuming that trains will not cross each other at a station, and in shutting his eyes and walking ahead on that assumption. *Ibid.*

14. If a person, knowing the approach of a railroad train at speed, unnecessarily stands so near the track that the common sense of mankind must condemn his act as a want of ordinary care, he cannot recover for personal injuries occasioned by being struck by the train, even if it is assumed that the defendant corporation held out an invitation to the plaintiff to cross the track at the point where he was injured; and experiments made shortly after the accident by putting a stick in the ground near the track when another train was passing are immaterial. *Rigg* v. *Boston, Revere Beach, & Lynn Railroad*, 309.

15. A woman who was familiar with the locality, which was a crowded thoroughfare in a city, started, accompanied by a police officer who was stationed there, to cross a street, at the corner of another street. She stopped, with the officer, in the middle of the crossing near the side of the railway tracks on the street, and waited for a car to go by, which she saw before it reached her. She was looking north at some teams, which were not near enough to injure her, while the car was coming from the south. She saw the front end of the car go by her, and thought she was far enough

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from it to be safe, but did not notice the rear end of the car. As the car turned the corner of the two streets at ordinary speed, she was struck on the temple by the handle on the rear dasher of the car. There was no switchman at the corner, and the conductor was off the car adjusting the switch. *Held*, in an action against the railway corporation for the injury, that there was no evidence of negligence on the part of the defendant. *Widmer* v. *West End Street Railway*, 49.

16. In an action for personal injuries occasioned to the plaintiff while alighting from the defendant's street car, it was assumed that the fair construction of the testimony of the defendant's witnesses was that in slowing up and coming to a stop the car made no sudden start forward, but the plaintiff testified that the car did make a sudden start just as she put her right foot to the ground. *Held*, that if the jury believed this statement, and also believed the testimony of the defendant's witnesses, that the plaintiff got off while the car was slowing up and before it had stopped, they would probably find that she was injured by the sudden starting of the car after it had begun to slow up, and before it had come to a full stop, and that, although no witnesses had testified that while the car was coming to a stop it was started up with a jerk, there was evidence from which the jury could find that such was the fact. *Hill* v. *West End Street Railway*, 458.

17. In an action for personal injuries it appeared in evidence that the plaintiff's wagon and the defendant's street car were attempting to go around a corner from one street into another in opposite directions; that as there was a block of vehicles it was difficult to make safe progress; that immediately before the accident the wagon and the car were both on the corner, and both stationary on account of the block, the head of the plaintiff's horse and the heads of the car horses close together, and that the driver of the car called out to the plaintiff to come ahead, and that then both the wagon and the car moved forward, the plaintiff starting up in consequence of the request of the car driver. There was also evidence tending to show that, after the wagon and car started up, the speed of the latter was accelerated, and that if the car had remained stationary for an instant there would have been no collision. On the other hand, there was evidence tending to show that, if the car had remained stationary, the wagon could not have gone on so as to get out of the way of the car, on account of another wagon, between which and the car there was not room for the plaintiff's wagon to pass. *Held*, that the circumstances were such that the general knowledge and experience of men would not at once condemn the conduct of either the plaintiff or the car driver as careless; that the court could not say that there was no evidence tending to show negligence; and that in such cases, even if the facts are undisputed, the question whether either or both of the parties was at fault is for the jury. *Kerrigan* v. *West End Street Railway*, 305.

See EMPLOYERS' LIABILITY ACT; EVIDENCE, 13, 20–28; LANDLORD AND TENANT, 1–3; LAW OF THE ROAD; PARENT AND CHILD, 2; PLEADING; SIDEWALK; TRIAL, 7.

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NEGOTIABLE INSTRUMENTS.

See HUSBAND AND WIFE, 3, 4; PROMISSORY NOTE.

NEW TRIAL.

Two petitions were brought for the determination of damages, the first for a triangular piece of land taken in fee simple for a sewer, and the second for an easement of building and maintaining a sewer under a long strip of adjoining land alleged by the respondent to be a public way. The respondent asked for an instruction that the petitioner could not recover additional damages for any use which might be made of the land taken, other than erecting buildings thereon; also that the jury could not consider the probability of smells, noise, or smoke as enhancing damages, even if not so offensive as to create a nuisance. These instructions were refused. *Held*, that the respondent was entitled to a new trial. *Held*, *also*, that perhaps it would be enough to say, that, as the cases were tried together, and as the second must be retried for certain reasons, justice required that there should be a new trial in the first case also, inasmuch as the damages attributable to the taking of the triangle were not clearly distinguished from those belonging to the long strip. *Taft* v. *Commonwealth*, 526.

See RULES OF COURT.

NORTHAMPTON.

See CONSTITUTIONAL LAW, 7.

NOTICE.

1. In an action against a city for personal injuries the notice stated that "on said School Street near the junction of Spring Street with said School Street in said W., to wit, on the sidewalk on the south side of said School Street, about fifty feet from said Spring Street, I fell," etc. There were two places on the sidewalk on the south side of School Street near its junction with Spring Street, and about fifty feet from Spring Street; one of which places was east of the junction, and the other west, and each of which was equally well described. There was no intention to mislead the city. In addition to the fact that the two places, either of which might be the place designated, were in the same neighborhood, and each was so near the intersection of the two streets that any officer of the city who should examine the locality would naturally perceive the ambiguity, and be led to visit both places, and to inquire which was the scene of the accident, there was evidence that the city officials had fully investigated the facts relating to the accident and the place where it occurred, and that the plaintiff had stated all the circumstances to the committee on claims of the city government at a meeting, at which the city solicitor was present, held shortly after the service of notice, and at which the chief of police stated all the facts in his possession. The judge directed a verdict for the defendant. *Held*, that

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the notice was sufficient if it was shown that there was no intention to mislead, and that the city was not in fact misled thereby, and that the case should have been submitted to the jury. *Veno* v. *Waltham*, 279.

2. A notice to a city stated that, on a day named, a person had been injured by a defect, consisting of an accumulation of ice and snow "on the sidewalk on the westerly side of C. Street in said city, and nearly opposite premises on the corner of C. and D. Streets, occupied by S." In an action for such injury, it appeared that the premises of S. extended from the intersection of the westerly line of C. Street with the northerly line of D. Street sixty-three and one half feet northerly on C. Street; and that there was a gutter connected with S.'s house across the sidewalk. The plaintiff's evidence tended to show that he was injured on the sidewalk on the westerly side of C. Street within a distance of seven feet next northerly of the gutter and opposite the premises of S.; and that the defect was an accumulation of ice and snow which extended about seven or eight feet in a northerly direction from the gutter. *Held*, that the notice was sufficient; and that, as the notice had no tendency to mislead the defendant, the jury might have found that the plaintiff did not intend to mislead, and that the defendant was not in fact misled thereby. *Conners* v. *Lowell*, 336.

See CONVERSION, 2; EVIDENCE, 21; EXECUTOR; MILK, 2; POOR DEBTOR, 2; SAVINGS BANK; WAY, 2.

NUISANCE.

See LANDLORD AND TENANT, 9–11; NEW TRIAL.

OFFICER.

See ARREST; EVIDENCE, 4, 5.

OLEOMARGARINE.

1. If a person has for sale in his shop oleomargarine colored in imitation of yellow butter, which is kept in a closed and covered refrigerator and cannot be seen by customers, although he has a sign in the shop to the effect that oleomargarine is sold there, he does not "expose for sale" such oleomargarine, within the meaning of the St. of 1891, c. 58, § 1. *Commonwealth* v. *Byrnes*, 172.

2. A complaint under the St. of 1891, c. 412, § 4, for selling oleomargarine from a wagon, at a time and place named, the defendant "not having then and there on both sides of said vehicle the placard, in uncondensed Gothic letters not less than three inches in length, 'Licensed to sell Oleomargarine,'" is supported by proof that the defendant's wagon was a covered one, with the front and rear ends open; that on the inside of the cover on each side was a placard, in form and size such as the statute requires; that these placards could be seen from the front and rear of the wagon, but could not be seen from the sides thereof; and that there were no placards on the outer sides of the wagon. *Commonwealth* v. *Crane*, 218.

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3. At the trial of a complaint under the St. of 1891, c. 412, § 4, for selling oleomargarine from a wagon, at a time and place named, the defendant "not having then and there on both sides of said vehicle the placard, in uncondensed Gothic letters not less than three inches in length, 'Licensed to sell Oleomargarine,'" the defendant has no ground of exception to the refusal of the judge to rule that this section of the statute "is in conflict with the act of Congress of August 2, 1886, and the rules and regulations of the commissioner of internal revenue thereunder, and is therefore unconstitutional and void." *Commonwealth* v. *Crane*, 218.

ORDINANCE.

See MUNICIPAL CORPORATION.

OYSTERS.

A license was issued to A., under the Pub. Sts. c. 91, §§ 97, 98, 99, and later statutes, to plant, etc. oysters on the flats in the tide waters of a bay. B. just previously had applied for a renewal of his license of the same flats, and, having failed to take it out, after being notified that it was to be granted, the license was issued to A., who thereafter brought an action of tort under the Pub. Sts. c. 91, § 99, against B. for entering the flats and carrying away oysters. *Held*, that the statutes contemplate a written and recorded license, and whatever right the defendant might have had if he had called for his second license upon receiving notice that it had been awarded to him, his failure to call for it left it open for the selectmen to grant a license to the plaintiff, and the license so granted was valid, and the fact that oysters planted by the defendant remained upon the territory gave the defendant no right to gather them after the plaintiff obtained his license. *Keene* v. *Gifford*, 120.

PARENT AND CHILD.

1. A widow with minor children, who keeps the family together and supports herself and them, with the aid of their services, has very much the same control over them and their earnings during their minority, and is subject to the extent of her ability to much the same civil responsibility for their education and maintenance, as a father. *Horgan* v. *Pacific Mills*, 402.
2. When a minor child lives with its mother, who is a widow, and is supported by her, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child caused by the negligence of the defendant. *Ibid.*

PARK.

See DEED, 2; EMINENT DOMAIN; EVIDENCE, 16, 17; WARRANTY, 4.

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PARTIES.

See EQUITY, 5, 12, 13; LANDLORD AND TENANT, 8; PARTITION, 1, 3; RAILROAD, 2; WARRANTY, 4.

PARTITION.

1. The owner of lands on both sides of the Concord River, in 1850, built a dam, a canal, and mills for his own use. Thereafter, from time to time, he conveyed mill sites along the canal, with the right to draw specified quantities of water therefrom when a certain number of cubic feet of water were flowing through it, and proportional fractional parts of any less volume, and covenanted with the grantees to enlarge the canal within a specified time. He then, in 1863, sold the residue of his water privileges, subject to the obligation of the grantee to enlarge the canal when necessary, and this residue, in 1866, by mesne conveyances, came into the possession of the plaintiffs. In 1875, the city of Boston, acting under the authority of St. 1872, c. 177, diverted from the Sudbury River, which, by its union with another stream a few miles above the plaintiffs' dam, forms the Concord River, a quantity of water equal to one fifth of the volume of water flowing in the Concord River at the dam. Subsequently the grantees of the residue of the water privileges brought suit against the other mill-owners for a partition of power. Above the dam there was a pond capable of being used as a reservoir, if not constantly drawn upon; and if drawn from only on week days and in working hours it would, when the river was low, enable the mills to receive their full supply on more days than if it was not thus used. There were covenants in the original grants to keep flashboards on the dam during a part of the year, and restrictions as to the use of the water during the working hours of week days, indicating that the grant was not merely of the actual flow of the working hours, but was a right to the flow of the water to be stored in the pond during the other hours of each day and on Sunday. *Held*, that the respondents were entitled to the use of the pond for storage so far as necessary to give full operation to their grants. *Held, also*, that the diminution of the volume of water in the Concord River, caused by the taking by the city of Boston of the water of its tributary, and the payment of damages to the respondents therefor, did not diminish their rights as against the plaintiffs to the quantity of water to which they were entitled under their grants. *Held, also*, that the question of enforcing the plaintiffs' obligation to enlarge the canal, sought to be raised by the answers of the respondents, could not be determined as an incident to the partition, it appearing that other persons whose rights were involved had not been made parties to the proceedings. *Wamesit Power Co.* v. *Sterling Mills*, 435.
2. The expense of the erection and setting in operation, by a hydraulic engineer appointed by the court, of an apparatus for measuring and dividing the water, should be borne by all the parties to a suit for the partition of a water power, in proportion to the extent of their respective interests. *Ibid.*

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3. A second bill in equity, brought by one of the respondents in a partition proceeding against one of the plaintiffs therein to enforce the obligation of the latter to enlarge a canal, was heard and considered in connection with the earlier proceeding. *Held*, that, all the necessary parties not being before the court, that question could not be then determined. *Wamesit Power Co.* v. *Sterling Mills*, 435.

PARTNERSHIP.

See Action; Equity, 3, 4; Evidence, 15; Guaranty; Husband and Wife, 3, 4.

PARTY WALL.

See Way, 2.

PATENT.

See Action.

PAYMENT.

See Appropriation, 1; Deed, 1; Promissory Note, 5.

PENALTY.

See Intoxicating Liquors, 20; Milk, 2, 3.

PERSONAL PROPERTY.

See Contract, 1, 7; Conversion; Devise and Legacy, 2-4; Evidence, 1; Husband and Wife, 1.

PLAN.

See Contract, 4.

PLEADING.

A declaration containing two counts alleged, in the first count, that the plaintiff was engaged as a contractor in erecting a building, and owned certain derricks and their appliances used in the construction of the building; that the defendant was engaged as an independent contractor in doing certain work on the building; that the plaintiff and the defendant entered into a valid written contract, a copy of which was annexed; that on a certain day, while the contract was in full force, and while the defendant was using one of the derricks, the derrick and its appliances broke and gave way, and injured certain persons named; that the breaking and giving way of the derrick and its appliances were caused by their

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unsafe and defective condition, of which the plaintiff knew, or by the exercise of due care ought to have known; that the injured persons did not know, and by the exercise of reasonable diligence and care would not have known, of such condition of the derrick and its appliances; that the plaintiff, knowing that the defendant was using the derrick, negligently ordered and allowed the injured persons to work for the plaintiff in a place that was dangerous owing to the condition of the derrick and its appliances, and their use by the defendant in that condition, and did not warn the injured persons of their danger; that the injuries were caused by such negligence of the plaintiff; that the injured persons were in the exercise of due care, and were regularly performing the duties of their employment as employees of the plaintiff; that the plaintiff was legally liable to the injured persons for all such injuries sustained by them; that the plaintiff, being threatened with suits by the injured persons, paid each a certain sum by way of compromise and in settlement of their claims; that the plaintiff gave the defendant immediate notice of the accident, and of his liability therefor, under the contract between them; that the defendant refused to settle the claims, and the plaintiff, before settling them, gave reasonable notice to the defendant of his intention so to settle them; and that the defendant owed the plaintiff the amount so paid in such settlements. The second count was similar to the first, except that, in the allegations of knowledge of the condition of the derrick and of negligence, the plaintiff's "superintendent" (without naming him) was substitued for the plaintiff himself. By the contract annexed to the declaration, the defendant was allowed to use the plaintiff's engines and derricks at the building at a certain rate of compensation; and it contained the following provision. "If any injury shall be occasioned to any person or property while you [the defendant] are using such engines or derricks, or as a result of such use, you [the defendant] are to indemnify us [the plaintiff] against any damage or expense by reason of the same, notwithstanding the condition of the engine, derrick, or appliances, or the negligence of our [the plaintiff's] employees upon the derrick or engine, may have caused or contributed to the injury." *Held*, on demurrer, that the declaration set out a good cause of action. *Woodbury* v. *Post*, 140.

See COMPLAINT, 2; EQUITY, 7, 12-14; MILK, 2, 3; NEGLIGENCE, 3, 7; PRACTICE, 1: REVIEW; TRIAL, 5.

PLEDGE.

See INSOLVENT ESTATES.

POISONING.

See WRIT OF ERROR, 1, 2.

POLICE COURT.

See COMPLAINT, 1; CONTINUANCE, 2.

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POLICE OFFICER.

See ARREST; EVIDENCE, 4, 5.

POLICE POWER.

See CONSTITUTIONAL LAW, 5.

POLYGAMY.

1. An indictment for polygamy, under the Pub. Sts. c. 207, §§ 4, 5, alleged that the defendant, at Portland, Maine, unlawfully married C. B. T., being the husband of M. A. B., who was alive, and from whom he had not been legally divorced. The defendant offered in evidence what purported to be a copy of the record of the Supreme Judicial Court of Maine, at a term held at Auburn on the third Tuesday of September, 1890, in a cause of divorce in which Thomas M. Lucas of Auburn, husband of Mary A. Lucas, was the libellant and Mary A. Lucas was the libellee, the libel alleging that they were married "at Brockton, in the State of Mass., May the 6th, 1876, by Rev. F. D.," and it appearing that the libellant gave notice, pursuant to the order of court, to Mary A. Lucas, who did not appear and was defaulted, and the court granted a divorce for desertion. The presiding justice rejected the copy on the ground that there was no evidence "that the defendant was the same Thomas M. Lucas named in said record." The exceptions recited that "Mary A. Lucas, formerly M. A. B.," had testified "that on the tenth day of May, in the year 1876, she was united in marriage with the defendant, whom she saw in court and identified, at Brockton, . . . by the Rev. F. D.," and that "he deserted her in the year 1881." The exceptions also recited that there was evidence "tending to show that in the month of February, A. D. 1890, and at other times, the defendant was residing in the State of Maine, and in the town of Auburn." *Held*, that the identity of the names, and the close resemblance of the other facts found in the record of the Maine court, and in the testimony at the trial in the present case, afforded abundant evidence that the defendant was the same person as the libellant in the record. *Commonwealth* v. *Lucas*, 81.
2. The words to continue "to cohabit with such second husband or wife," as used in the Pub. Sts. c. 207, § 4, mean to continue to live or to dwell together as husband and wife ordinarily do, but, according to the weight of authority, do not necessarily imply actual sexual intercourse. *Ibid.*

POND.

See PARTITION, 1.

POOR DEBTOR.

1. A commitment of a poor debtor to jail for contempt, under the provisions of the St. of 1890, c. 128, is merely a proceeding in aid of other statutory

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provisions relating to the collection of judgment debts, and the debtor may obtain his discharge in any of the ordinary methods applicable to an arrest upon an execution; and there is nothing unconstitutional or illegal in such an imprisonment. *Kerrigan's case*, 220.

2. A judgment debtor delivered himself up for examination before the court, as required by his recognizance. The amended record showed that Monday was the time appointed for the examination under St. of 1888, c. 419, § 7, but by inadvertence the notice gave the time as Sunday. When the mistake was discovered, a later day was appointed and a new notice was served. It was contended that the second notice was invalid, under Pub. Sts. c. 162, § 33, because it was issued on Monday, only two days after the issuing of the first one. *Held*, in an action on the recognizance against the surety, that there was no breach thereof, and that the judgment debtor was lawfully discharged. *Merrill* v. *Kaulback*, 328.

POST OFFICE.

See ARBITRAMENT AND AWARD; TRADEMARK.

POWER.

See CHATTEL MORTGAGE.

PRACTICE.

1 Technical objections to the form of allegations cannot be taken by objecting to evidence in support of them. *Soper* v. *Manning*, 381.

2. Merely formal objections to an indictment to avail should be taken at the trial. *Sturtevant* v. *Commonwealth*, 598.

See ARBITRAMENT AND AWARD; COMPLAINT; CONTINUANCE; COSTS; EQUITY, 5–14; EVIDENCE, 24, 25; EXCEPTIONS; MECHANIC'S LIEN, 1; MILK; RAILROAD, 2; RECORD; REDEMPTION, 1, 4; REVIEW; RULES OF COURT; TRIAL; VARIANCE; VERDICT; WRIT OF ENTRY; WRIT OF ERROR.

PRESCRIPTION.

See SEWER, 2, 3.

PRESUMPTION.

See CONTRACT, 4; EVIDENCE, 28; HUSBAND AND WIFE, 2; INTOXICATING LIQUORS, 24; SAVINGS BANK; WRIT OF ERROR, 3.

PRINCIPAL AND AGENT.

1. In an action against A. B. on a contract in writing to purchase real estate signed by his son, "A. B. by C. D.," it is incumbent on the plaintiff to prove either that the defendant's son had an original authority to

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sign the defendant's name, or that his act of doing so was afterwards ratified by the defendant. *Price* v. *Moore*, 524.

2. While a principal may be bound by the fraudulent conduct of an agent while acting for him in making a sale, he will not be affected by the agent's fraud in selling the property of another person and pretending at the same time that the principal's property belonged to that other, and was included in the sale; nor can the principal be estopped on the ground that, while having authority to represent the principal in selling his goods, the agent stood by and permitted the principal's goods to be sold and paid for as the property of another. *Stimpson* v. *Achorn*, 312.

3. Persons employed by a town to make repairs in a highway which involve a change in its grade are not liable to an owner of abutting land damaged thereby, provided they act within the scope of their authority under a vote of the town, and the town itself has power to make such repairs. *Proctor* v. *Stone*, 564

4. A bill in equity alleged that B., the defendant, by a written agreement under seal, duly authorized by him and for a valuable consideration, agreed to execute on a certain date a bond for a deed of land owned by him, the form of the bond, the price, and the terms of sale to be agreed upon in writing by and between the plaintiff A. and B. This agreement, which was executed by C., describing himself as "agent for B.," recited that he had received from A. five hundred dollars in part payment of the land in question, "it being understood that a bond for a deed of said property is to be given to-day by B." By an unsigned agreement of the same date between A. and B. and another, B. agreed to sell, and A. and another to purchase, the land in question, according to certain terms therein set forth. The bill alleged a demand by A. on B. to execute the bond, and refusal by B., and the prayer was that B. be restrained from making a deed of the land, or placing any encumbrance thereon, and that he be ordered to execute and deliver to A. a bond as aforesaid. The case was referred to a master, who found, upon the evidence, subject to the legal construction of the contracts, that B. put the property in C.'s hands to procure a purchaser, to advertise the same, and to obtain offers of purchase; that C. had no authority to complete a contract of sale without submission to and authority from B.; that A. made to C. an offer, and was informed that it would have to be communicated to B., and that the offer was subsequently accepted "subject to a proper written contract being prepared." It did not appear that B. knew of the receipt for five hundred dollars, but it did appear that A. knew, when he paid the money to C. and obtained the instrument, "that, although the price was fixed, there were other points to be determined and details to be settled, and what such points and details were, and that the same were to be incorporated into a written agreement, and submitted to and approved by the defendants as terms of the sale." *Held*, that it was not necessary to consider whether the receipt for five hundred dollars was sufficient of itself to satisfy the Pub. Sts. c. 78, § 1, cl. 4, inasmuch as some of the essential terms were still to be agreed upon, and to be expressed in an instrument in writing to be signed by the parties; and that it could not be contended

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that B. ratified the act of C., inasmuch as it did not appear that B. had any knowledge of it. *Callanan* v. *Chapin*, 113.

5. A bill in equity was brought to enforce specific performance of an agreement signed by B. and the other owners of real estate to sell it to A. and another. The agreement was then put into the custody of C., as the agent of B. and the other owners, with authority to deliver it to A. and the other person on his being satisfied of their financial responsibility. There was nothing in the evidence to show that C. acted for any one but the defendants in holding the paper, and the paper was never delivered. *Held*, that, if C. was not satisfied in his own mind of the fact that A. and the other person were financially responsible, he had no authority from his principals to deliver the agreement; that, until he did deliver it, they could revoke his authority; and that, although the agreement was signed by the parties, yet as there was no delivery it never took effect, and could not be considered a sufficient memorandum within the statute of frauds. *Ibid.*

See BENEFICIARY ASSOCIATION, 2, 3; EVIDENCE, 7, 10; INTOXICATING LIQUORS, 7, 8; PROMISSORY NOTE, 4.

PRISON.

The word "prison," as used in the St. of 1887, c. 435, § 1, is not limited to the state prison, but includes all places of imprisonment for crime. *Sturtevant* v. *Commonwealth*, 598.

PROBATE COURT.

See ESTATE OF PERSONS DECEASED; EXECUTOR; TRUST FUND.

PROMISSORY NOTE.

1. In an action upon a promissory note, by the payee against the maker, it is competent for the plaintiff to prove that the note was given to him as a part of the consideration for an instrument of release executed by him to the defendant, in addition to the consideration mentioned therein. *Hill* v. *Whidden*, 267.

2. A promissory note, payable to an executor in his own name, without his official designation, may be enforced against the maker, although founded upon a consideration moving from the payee as executor. *Ibid.*

3. A release of all debts, demands, actions, and causes of action existing at its date is not a bar to an action by the releasor upon a promissory note given to him by the releasee as a part of the consideration for the release, and of even date therewith. *Ibid.*

4. A., in order to obtain insurance upon his life at once, instead of waiting for the action of the insurance company on his application, gave a promissory note for the amount of the premium payable to B., an agent of the company, who signed and delivered to A. a contract purporting to give such insurance, which was expressed to be subject to certain conditions

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printed on the back, one of which was that the contract was not valid unless the premium was "actually paid in cash," and another of which was that none but certain designated officers of the company had authority to alter the contract. B. charged himself with the amount of the premium, and gave the company credit for it, on his books; but he did not pay the company any cash on account of this insurance until long after the policy had been tendered to A. and the contract had been repudiated by him. B. had been accustomed to keep money received for the company in his private bank account, with the knowledge and consent of the company; but the company had no knowledge that A. had not paid his premium in cash, and did not waive the condition printed on the back of the contract. *Held*, in an action by B. against A. upon the note, that the note was without consideration. *Dunham* v. *Morse*, 132.

5. In an action on a promissory note payable to the order of the plaintiffs and signed by the defendant, a married woman, there was evidence that she knew that her husband had had dealings with the plaintiffs and was indebted to them, and that she delivered the note to her husband to be used by him. *Held*, that the judge, trying the case without a jury, could properly infer that she delivered the note to her husband to be given to the plaintiffs in payment of his account with them. *Bell* v. *McDowell*, 79.

6. On a bill in equity brought against a married woman on three promissory notes signed by her husband, payable to her order, and bearing her name upon the back under the words, "I hereby charge my separate estate with the amount of this note," it appeared in evidence that a written agreement was made between the plaintiff and the husband of the defendant referring to the notes, and providing that, if paid to the plaintiff, they should be a settlement in full of all claims between the parties to date; but if any of them should not be paid, the account should stand as stated in the plaintiff's ledger. A week or two after the agreement and notes were signed by the husband and left with the plaintiff, the husband brought his wife to the office of the plaintiff, and she put her name on the back of each of the notes under the words referred to. The plaintiff was away, but had left the papers with his bookkeeper. The notes were used by the plaintiff according to the terms of the written contract. *Held*, that evidence of an original oral agreement that the defendant was to lend her credit to her husband was competent evidence in connection with the other facts to show that the papers when left with the plaintiff were not delivered, but merely left to await completion, that the case was one of an accommodation indorsement, that the words written over the signature of the defendant had no tendency to show the nature of her obligation, and that, if she made any kind of a contract, her separate estate would be chargeable for the performance of her undertaking as well without these words as with them. *Robertson* v. *Rowell*, 94.

7. The cases which hold that knowledge of the consideration by one putting his name on a note for the accommodation of another is necessary to bind him, are where a note had previously taken effect as a contract, and a new and independent consideration is required for the new contract. *Ibid.*

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8. If the holder of a promissory note makes a demand upon the maker personally at the indorser's office during business hours of the last day of grace, and produces the note, and the maker says that he is unable to pay it, and makes no objection to the place of the demand, it is sufficient to hold the indorser. *Parker* v. *Kellogg*, 90.

See COSTS; DEED, 1; EXCEPTIONS, 3; HUSBAND AND WIFE, 3, 4; INSOLVENT ESTATES.

PROXIMATE CAUSE.

See INSURANCE, 1.

QUIET ENJOYMENT.

See LANDLORD AND TENANT, 4–9.

RAILROAD.

1. Two railroad stations can be relocated at the same point in one proceeding under the provisions of the Pub. Sts. c. 112, § 157, and the contention that such a change, necessarily lessening the number of stopping places, is an abandonment forbidden by the provisions of the Pub. Sts. c. 112, § 156, is unsound. *Cunningham* v. *Board of Railroad Commissioners*, 104.
2. A petition was brought by residents of a town, who were legal voters and owners of real estate therein, for a writ of certiorari to quash the proceedings of the Board of Railroad Commissioners approving the proposed relocation of two stations on the line of a railroad and their union in one station. *Held*, that the petition must be dismissed, because none of the petitioners were parties to the original proceedings before the board, and none of them showed such a state of facts as would entitle them to a private remedy if the action of the board was unauthorized or illegal. *Ibid.*

See CONSTITUTIONAL LAW, 7; EMPLOYERS' LIABILITY ACT, 5, 8–10; EVIDENCE, 7, 22–28; JURY; LAND DAMAGES; MILK; NEGLIGENCE, 5–14.

RAILROAD COMMISSIONERS.

See MILK; RAILROAD.

RATIFICATION.

See ESTATE OF PERSONS DECEASED; PRINCIPAL AND AGENT, 1, 4.

REAL ESTATE.

See CONTRACT, 4, 5; DEED; DEVISE AND LEGACY, 2, 4; EVIDENCE, 7, 8, 16, 17; EXECUTION; LANDLORD AND TENANT; MECHANICS' LIEN; PRINCIPAL AND AGENT, 1, 4, 5; WRIT OF ENTRY.

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REASONABLE TIME.

See CONTRACT, 5.

RECEIVER.

See EQUITY, 6.

RECOGNIZANCE.

See POOR DEBTOR, 2.

RECORD.

A court has power to amend its record, even after the lapse of a long time, and the record as amended imports absolute verity. *Merrill* v. *Kaulback*, 328.

See ATTACHMENT; COMPLAINT, 1; POLYGAMY, 1.

RECOUPMENT.

See LANDLORD AND TENANT, 4, 6.

REDEMPTION.

1. A bill to redeem land from a mortgage comes within the St. of 1883, c. 223, § 13, which provides that suits may be brought in any county where a transitory personal action between the same parties might be brought. *Dary* v. *Kane*, 376.
2. The interest and title of an administrator in and to an equity of redemption are sufficiently set forth in a bill to redeem, which, in this respect, follows as closely as possible the form enacted with the St. of 1883, c. 223. *Ibid.*
3. In a bill in equity to redeem land from a mortgage an averment that the defendant's testate, who devised all his real estate to the defendant, for a long time before his decease, and the defendant himself during all the time since the testate's decease, occupied the premises without accounting for the rents and profits, sufficiently sets forth the defendant's possession. *Ibid.*
4. An ordinary bill to redeem was brought, in which no peculiar relief was prayed for, and in which the accounts were taken and the amounts due determined without a suggestion that the plaintiffs were not ready to perform the offer contained in their bill, or that any peculiar form of decree was desired. The question was whether the decree should require the plaintiffs to redeem within a time stated, or should allow redemption "at any time before a valid and effectual foreclosure of said mortgage by a new execution of the power of sale therein, or otherwise." *Held*, that the decree being in the form usual in cases of the kind was proper, and that such a decree as the plaintiffs sought was without precedent. *Dennett* v. *Codman*, 371.

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REGISTRY OF DEEDS.

See ATTACHMENT.

RELEASE.

See CONTRACT, 5; PROMISSORY NOTE, 1, 3.

REMAINDER.

See DEVISE AND LEGACY, 2.

RENT.

See LANDLORD AND TENANT, 5–8.

REPORT.

See DECLARATION OF TRUST; EQUITY. 8, 9.

RES ADJUDICATA.

See EQUITY, 11; REVIEW, 2.

RESTRICTION.

See DEED, 2.

RESULTING TRUST.

See BENEFICIARY ASSOCIATION, 1.

RETURN.

See EXECUTION.

REVIEW.

1. A general request to rule that a petition to vacate a judgment is insufficient in form, is entitled to no more favorable consideration than a demurrer, which must point out any defect of technical accuracy of allegation relied upon. *Soper* v. *Manning*, 381.
2. It is no bar to a petition to vacate a judgment that a previous petition was dismissed without prejudice, by reason of certain formal defects and not upon the merits. *Ibid.*
3. Where there is evidence of sufficient cause for a review, this court cannot revise the finding or the discretion of the justice of the Superior Court. *Ibid.*

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RIPARIAN OWNER.

See PARTITION.

ROBBERY.

See BREAKING AND ENTERING BUILDINGS; EVIDENCE, 6.

RULES OF COURT.

The Superior Court has no power to grant a motion for a new trial made by a party to an action, if the moving party has failed to comply with a rule of that court requiring him to cause a copy of the motion to be delivered to the adverse counsel on the day the same is filed. *Cram* v. *Moore*, 276.

SALE.

See CONTRACT, 1, 7; CONVERSION; INTOXICATING LIQUORS; MUNICIPAL CORPORATION; PRINCIPAL AND AGENT, 2; TRESPASS, 1; WARRANTY, 1–3.

SAVINGS BANK.

In an action against a savings bank for the amount of a deposit, brought by the depositor for the use of his assignee, it appeared that on April 26, 1892, the assignee made demand on the defendant for the amount due, which the defendant declined to pay because of the omission to specify the month and day of the month in the date of the plaintiff's order to the assignee. Fifteen days thereafter the defendant tendered to the assignee the sum due, but without interest for the fifteen days. The defendant contended that the plaintiff was bound to show that by the defendant's by-laws he was entitled to call for payment of the amount due without prior notice. *Held*, that it was for the defendant to show, if it could, that the plaintiff was not so entitled; that if the defendant had any rule entitling it to prior notice, it had not been made known to the court, and there was no legal presumption that it had; that the demand on April 26 was good; that the subsequent tender was insufficient, and that the plaintiff was entitled to judgment. *Weld* v. *Eliot Five Cents Savings Bank*, 339.

SCREEN.

See INTOXICATING LIQUORS, 14–18.

SEWER.

1. On a petition for an easement of building and maintaining a sewer under a strip of land, the question whether the strip is a public way by prescription is for the jury. *Taft* v. *Commonwealth*, 526.

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2. A relocation of a public way establishing the termini so as to embrace a road denied to have been part of the way, is conclusive upon all persons who were entitled to be heard in the proceedings which led to it. Therefore such persons cannot recover damages for the subsequent laying out of a sewer under such road. *Taft* v. *Commonwealth*, 526.

3. On a petition for the determination of damages for an easement of building and maintaining a sewer under a strip of land alleged by the respondent to be a public way, instructions which lay down too absolutely that, if the public travel bears an insignificant proportion to the private travel over a road, no public way will be established by prescription, are erroneous. *Ibid.*

See EMPLOYERS' LIABILITY ACT, 1, 2; EXPERT; NEW TRIAL.

SIDEWALK.

It is competent for a jury to find in an action against a city for personal injuries that a hole in a sidewalk nearly circular in form, five and one half inches in diameter one way and six inches the other, and about an inch in depth at the edges and somewhat deeper in the middle, which hole caused the injuries to the plaintiff, is a defect for which the city is responsible under the Pub. Sts. c. 52, § 18. *Marvin* v. *New Bedford*, 464.

See EVIDENCE, 13, 14; LANDLORD AND TENANT, 1–3; NOTICE.

SPECIFIC PERFORMANCE.

An executory agreement for a settlement of a suit for personal injuries, which was not made of record in the case, and was in fact made by an attorney at law under a mistake of fact as to his authority, cannot be specifically enforced in equity against his client. *New York, New Haven, & Hartford Railroad* v. *Martin*, 313.

See CONTRACT, 5; PRINCIPAL AND AGENT, 4, 5.

STATUTE.

See ARBITRAMENT AND AWARD; BENEFICIARY ASSOCIATION; COMPLAINT, 2; CONSTITUTIONAL LAW, 1, 2, 5, 6, 7; EMINENT DOMAIN, 1; EMPLOYERS' LIABILITY ACT; EQUITY, 7; ESTATE OF PERSONS DECEASED; EVIDENCE, 10, 11; HUSBAND AND WIFE, 1; INTOXICATING LIQUORS, 1–15, 20; JURY; LAW OF THE ROAD; MECHANIC'S LIEN, 2, 3; MILK; NEGLIGENCE, 3, 9, 10; OLEOMARGARINE; OYSTERS; PARTITION, 1; POLYGAMY; POOR DEBTOR; PRINCIPAL AND AGENT, 4; PRISON; RAILROAD, 1; REDEMPTION, 1, 2; SIDEWALK; TAX; TRIAL, 7.

STATUTE OF FRAUDS.

See DECLARATION OF TRUST; PRINCIPAL AND AGENT, 4, 5.

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STREET.

1. A city is not bound, when a way is laid out, to make it safe and convenient for travellers through its entire width, if it is so wrought as to be reasonably fit for the public use for which it was designed. *Metcalf* v. *Boston*, 284.
2. The authorities of a city, in laying out a way, ordered "that the parcel of land before described be and the same hereby is taken and laid out as a public street or way of the said city with the name of M. Avenue, and the grade thereof is established, according to a plan of the said laying out and profile of the grade, made by" the city surveyor, of a certain date. *Held*, upon a petition by an abutter on the way for a writ of mandamus to the city, that the order laying out the way did not so prescribe the mode of constructing it that the city was bound to grade it to its full width. *Ibid.*

See Constitutional Law, 7; Evidence, 13, 14; Law of the Road; Municipal Corporation; Notice; Principal and Agent, 3; Sidewalk.

STREET RAILWAY.

See Negligence, 15–17.

SUPERIOR COURT.

See Continuance; Costs; Evidence, 9; Exceptions, 1; Review; Rules of Court.

SUPPORT.

See Devise and Legacy, 1; Parent and Child; Trust Fund.

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SUPREME JUDICIAL COURT.

See Costs; Exceptions, 1; Executor; Review, 8.

TAX.

A corporation organized under the laws of another State, having an office and doing a large part of its business in a city in this Commonwealth, cannot be taxed on money deposited by it in a national bank in that city, and the provisions of the Pub. Sts. c. 11, § 20, that "All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May, except," etc., do not apply. *Boston Investment Co.* v. *Boston*, 461.

TENANTS IN COMMON.

On a writ of entry it appeared that the deed in question, given in 1868, was to A. and B., wife of A., "as tenants by the entirety and not as tenants in common." The grantees were not in fact husband and wife. Under the St. of 1885, c. 287, a deed will create an estate in common, unless by its true construction it is expressed therein that the grantees are to take the land jointly or as joint tenants, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy. *Held*, that the effect of the deed was to create an estate in joint tenancy, without the special features of an estate in entirety. *Morris* v. *McCarty*, 11.

TENDER.

See Equity, 2; Savings Bank.

TIDE-WATERS.

See Oysters.

TORTS.

See Conversion; Employers' Liability Act; Evidence, 1, 12–14, 20–28; Landlord and Tenant, 1–3; Negligence; Notice; Warranty, 2.

TOWN.

See Charity; Constitutional Law, 3; Employers' Liability Act, 1, 2; Principal and Agent, 3; Railroad, 2.

TRADE-MARK.

Upon a bill in equity to enjoin N. from using the word "Draper" as applied to other oilers than those made by the plaintiff corporation, the following facts appeared. In 1890, the plaintiff corporation purchased the stock in trade and good will of Francis Draper & Co., including the possession of

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their factory, of which they were tenants at will, and took a covenant from the members of the firm not to engage in the manufacture of oil cans for ten years. A little later, the plaintiff corporation took from the same firm a grant of the exclusive right to the use of the word "Draper" for oilers for the same ten years. Draper & Co. had made hardware since 1833, and had put the name "Draper" on different articles of their make. About 1880, they began to make oilers, and put their name upon them in various forms to denote that the cans were of superior excellence. For some years before 1888, and also since, there have been inferior oilers in the market resembling the genuine article, and called Draper oilers and Star oilers. From 1880 to 1884, one A. bought some cans from Draper & Co., manufactured cans resembling theirs, and marked those in which he dealt "Draper Oiler Company." Draper & Co. having stamped a lot of cans made for N. "Draper Oiler Co." A. notified them not to use that label, alleging that he had a copyright on it. To avoid controversy, they then stamped the oilers which they made for N. "F. Draper & Co.," until 1888, when, becoming dissatisfied with him, they marked the oilers made for him "Cambridge Manufacturing and Oiler Co." In 1878, N., until then in the employ of Draper & Co., began to sell their goods on his own account. In 1882, he sold most of the oilers made by them. In 1885, he published a catalogue, calling it "Catalogue of Draper Oiler Co." A later one was entitled "Catalogue of Noera [the defendant] and Draper," etc. Up to 1887, Draper & Co. made all the oilers sold by N. under the name Draper Oiler Co. After that, N. began to have the less important parts made elsewhere, and then the oilers were completed by Draper & Co. In selling oilers, N. packed them in boxes labelled, "Draper Steel Oilers." In 1890, N. sold out to the plaintiff corporation, and for the time went out of business on his own account, and entered the employ of the plaintiff. Later in the same year, the parties released each other from the agreement made at that time. *Held*, that the bill could be maintained. *Held, also*, on a bill in equity brought by N. to enjoin the corporation from receiving from the post office any mail addressed to the "Draper Oil Co.," that the court would not attempt to dispose of the bill further than to deny the injunction. *Noera* v. *H. A. Williams Manuf. Co.* 110.

TRAVELLER.

See Law of the Road; Negligence, 12–17; Street, 1.

TRESPASS.

1. If an exchange of personal property has been rescinded for breach of warranty, and the warranted article has been returned to its original owner, and a restoration of the article taken by him in exchange has been demanded and refused, the person entitled to such restoration may enter upon the land of the other and take away his property, if this can be done without a breach of the peace or actual opposition. *Smith* v. *Hale*, 178.

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2. At the time when a certain tract of land was divided into building lots, and a plan thereof was made and recorded, a strip of land was left open, as if for a passage, though it was not called so on the plan; and when the owner of the tract afterwards conveyed two of the lots adjoining the strip to A., no mention was made of the strip, but the land conveyed was described as "lots number five and six on a plan." B. also acquired a lot of the land adjoining the strip. *Held*, that A. could not maintain an action against B. for trespass, in using the strip for a passage, there being no obstruction to A.'s use of it as a passage. *O'Brien* v. *Flynn*, 198.

See WARRANTY, 2; WAY, 1.

TRIAL.

1. The proper time to present requests for instructions is before the charge, and not after, unless there are circumstances making it necessary to call attention to some matter of detail or some phase of the case which has been overlooked or inaccurately dealt with. *Leydecker* v. *Brintnall*, 292.
2. After the case had been committed to the jury, the judge presiding at the trial sent for them, and in open court, though in the absence of counsel on both sides, gave them further instructions, after which they returned a verdict for the defendant. *Held*, that the plaintiff had no ground of exception. *Kullberg* v. *O'Donnell*, 405.
3. It is the duty of the parties or their counsel to be present in court while it is open, after the trial of an action has begun until it is concluded, and the presiding justice cannot be prevented from giving further instructions to the jury because one or both of the parties, or their counsel, choose to absent themselves from the court while in session and while the jury are deliberating upon the case. *Ibid.*
4. The presiding justice may properly rule upon the effect of the evidence and direct a verdict, notwithstanding the fact that the jury have taken a view, if nothing occurred at the view to show that his ruling was wrong. *Rigg* v. *Boston, Revere Beach, & Lynn Railroad*, 309.
5. Where there is nothing to submit to the jury under the second count of a declaration containing two counts, stating different grounds for recovery for the same cause of action, the plaintiff is not harmed by the ruling requiring him to elect, at the close of his evidence, on which count he will rely. *McLean* v. *Fiske Wharf & Warehouse Co.* 472.
6. A. brought an action for personal injuries against B., the owner of the premises where the accident happened. The premises were let to C. That part of the evidence most favorable to A., considered by itself, had no tendency to show that B. undertook to have an oversight of the premises, and to keep them in safe and proper condition for C. and his tenants, without notice of defects or special request. *Held*, that the case was rightly withdrawn from the jury. *Ibid.*
7. In an action under the St. of 1887, c. 270, for the death of C., occasioned while employed in a sewer trench in process of construction by a town by the caving in of the walls of the trench, the first count of the declaration,

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based upon § 1, cl. 1, alleged certain defects in the condition of the planks and timbers used for bracing up the sides of the trench, in the mode of construction, and in not tightening the bracing on the day of the accident; and the second count, based on § 1, cl. 2, alleged that the negligence of the superintendent "consisted in directing and ordering said C. to work at the bottom" of the trench, and described the condition of the trench as in the first count. At the close of the evidence, the judge required the plaintiff to elect upon which count she would proceed; to which she excepted, and elected to proceed upon the first count. There was no evidence that the superintendent in charge of the work ordered C. to go into the trench; but the evidence was that C. went into the trench of his own motion. *Held*, that the plaintiff was not injured by being required to elect on which count she should proceed. *Conroy* v. *Clinton*, 318.

8. If two persons are indicted jointly, it is within the discretion of the presiding judge to grant them separate trials; and the fact that admissions have been made by one which are not evidence as against the other is not a conclusive ground for ordering them to be tried separately. *Commonwealth* v. *Bingham*, 169.

9. At the trial of an indictment in two counts, one charging A. with forging a deed, and the other charging A. and B. with uttering the forged deed, evidence was admitted of a conversation between a detective and B., in the absence of A., in which B. made certain admissions prejudicial to A. A. moved to strike out this evidence. The judge denied the motion; and instructed the jury at the time, but not in the final charge, that they were not to consider this evidence in dealing with the case against A. *Held*, that A. had no ground of exception. *Ibid.*

10. At the trial of a complaint for an assault upon an officer while in the discharge of his duty, the officer testified, without objection, that he was assaulted while attempting to arrest the defendant; and that he had a capias at that time, and so stated to the defendant. The capias was not produced by the government, although called for by the defendant. The judge refused to rule, as requested by the defendant, that, in the absence of the capias, the evidence for the government did not sustain the complaint. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Colligan*, 163.

See CONTINUANCE; EXCEPTIONS; INSURANCE, 3; LAND DAMAGES; NEW TRIAL; PRACTICE; SEWER; WITNESS; WRIT OF ERROR.

TROVER.

See CONVERSION; EQUITY, 1; EVIDENCE, 1.

TRUST AND TRUSTEE.

See APPROPRIATION, 2; BENEFICIARY ASSOCIATION, 1; CHARITY; CONTRACT, 2; CORPORATION; DECLARATION OF TRUST; DEVISE AND LEGACY, 2, 4; EQUITY, 5; HUSBAND AND WIFE, 2; INTEREST; TRUST FUND; WARRANTY, 4; WRIT OF ENTRY.

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TRUST FUND.

A testator, by his will, gave to his executors all debts due to him, and all his lands in certain States, in trust, "to collect the debts, and to sell any of the lands as fast as may be necessary for the payment of my debts, and the suitable maintenance of my family until my debts are paid, with the expense of executing this trust to that time." *Held*, that the executors were not required to furnish maintenance to the testator's two children after the expiration of more than nine years from his death, although some debts of the testator were still unpaid, and after the family had been broken up by the residence of his son for nearly two years at one time in a foreign country, and the marriage of his daughter, and the death of her husband, and the subsequent death of her mother, even though the mother until her death, and the daughter during the whole of this time, had continued to live in the homestead, and though the son and daughter were again both occupying the homestead; and that the fact that the executors had made payments to the son and daughter as and for such maintenance after the expiration of said nine years, did not preclude the executors from charging such payments in their probate account against the other interests of said son and daughter in the estate. *Sheffield* v. *Parker*, 330.

ULTRA VIRES.

See MUNICIPAL CORPORATION.

VARIANCE.

An indictment alleged a sale of intoxicating liquor to one Henry Bishop, whose name appeared at the trial to be Henri Leveque, but he himself testified that he was commonly known by the other name. *Held*, that the question of variance was one of fact for the jury. *Commonwealth* v. *Gould*, 499.

See NEGLIGENCE, 7; OLEOMARGARINE, 2.

VENDOR AND PURCHASER.

A vendee of land, to be conveyed free of encumbrances, who absolutely refuses to accept performance of the contract of sale upon grounds other than the ground of a defect in the deed, cannot afterwards, in an action for the breach of his agreement to purchase, avail himself of any defect in the deed first tendered, a proper deed having been seasonably tendered to him. *Baker* v. *Hall*, 361.

See CONTRACT, 4, 5; TRESPASS, 1; WARRANTY, 1–3.

VENUE.

See REDEMPTION, 1.

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VERDICT.

If the facts necessary to sustain a verdict of guilty on one count are inconsistent with a verdict of guilty on the other, further deliberation is necessary in order that the jury may decide the alternative, and the judge cannot direct a verdict of not guilty upon either; but where the facts necessary to sustain the verdict on the first count, charging the higher offence, are all consistent with those charged in the third count, even if not necessarily including them, the defendant suffers no wrong in being acquitted on the third count. *Commonwealth* v. *Lowrey*, 18.

See COMPLAINT, 1; CONVERSION, 1; EMPLOYERS' LIABILITY ACT, 2; INSURANCE, 3; TRIAL, 2–4; WRIT OF ERROR, 1, 2.

VESTED INTEREST.

See BENEFICIARY ASSOCIATION, 3.

VESTED RIGHTS.

See CONSTITUTIONAL LAW, 7.

VIEW.

See TRIAL, 4.

WAIVER.

See CHATTEL MORTGAGE; DEED, 1; VENDOR AND PURCHASER.

WARRANT.

See ARREST; COMPLAINT, 1.

WARRANTY.

1. A jury may rightly find that a vendee relied upon a warranty, although he does not, at the trial, testify in express terms that he did. *Smith* v. *Hale*, 178.

2. At the trial of an action for trespass, it appeared that the plaintiff exchanged his wagon for the defendant's heifer, and warranted it; that the wagon broke down, and about three weeks afterwards the defendant returned it to the plaintiff's premises in that condition, and demanded the heifer, which the plaintiff refused to give up; and that the defendant, in the plaintiff's absence, entered upon his premises and took the heifer away. The defendant admitted that she must show that she offered seasonably to return the wagon to the plaintiff and demanded of him the heifer. The plaintiff asked the judge to instruct the jury that, "in order to rescind the contract the defendant was bound within a reasonable time to restore to the plaintiff the buggy [wagon] in as good condition as she

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received it." The judge refused to give this instruction, and instructed the jury that, if they were satisfied that the plaintiff made a warranty of the wagon, and the defendant relied upon the warranty in making the trade, and there was a breach of the warranty, "that would authorize the defendant to return the wagon to the plaintiff, and to demand of him the heifer which she traded for it in return, and it would be his duty to receive the property and give the heifer back." *Held*, that the plaintiff had no ground of exception. *Smith* v. *Hale*, 178.

3. A purchaser of an article may examine it for himself, and exercise his own judgment upon it, and at the same time may protect himself by taking a warranty. *Ibid.*

4. A bill in equity was brought upon a covenant of warranty in a deed under which the plaintiff obtained title, which deed was executed by six grantors to two of their number, in trust, whenever required by a majority of the grantors, to convey by deed "containing a warranty against all persons claiming under them as trustees under this deed." The covenant in suit was that of the grantors to warrant and defend the premises "to the said grantees, the survivors of them, their successors and assigns for the purposes aforesaid." The trustees conveyed to a corporation, with the limited covenants provided for by the words quoted. The corporation having conveyed a part of the tract to the plaintiff, it was alleged that two parcels had been dedicated to the public as public parks by the six grantors before the delivery of their deed, and that the plaintiff had been evicted by a former decree of this court. *Held*, on demurrer, that a covenant by several with two of their number will not be enforced at law: that although a covenant of warranty running to the grantee, his heirs and assigns, can be sued upon by the assignee in his own name, still it does not operate as a letter of credit offering a new covenant to whoever will take the land on the faith of it; that the assignee stands as successor to the original covenantee, and takes the original covenant with all its manifest infirmities, and that the covenant sued upon was confined to the trustees and their successors in the trust. *Abbott* v. *Hills*, 396.

See CONTRACT, 7; TRESPASS, 1.

WATER AND WATERCOURSE.

See PARTITION.

WAY.

1. Three parcels of land, A, B, and C, belonging to different persons, were situated on a private way leading northerly to a highway. Lot A lay on the easterly side of the private way, between lot B and the highway; lot B was situated at the southerly end of the private way; and lot C was situated on the westerly side of the private way opposite to lot A. Subsequently the three lots were conveyed to one person, who continued to use the way in connection with lot B until his death. Afterward his heirs

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conveyed lot A to the plaintiff, the westerly boundary running "on a courtway"; lot B was conveyed to the defendant, the boundary line on one side running "to a way leading to Essex Street," and then running "by said way"; lot C was conveyed to a third person, the boundary line on the easterly side running "southerly on a courtway, . . . with all the rights in common on said court." *Held*, in an action of trespass brought by the owner of lot A against the owner of lot B, that, construing all the deeds together, it was the intention of the grantors that the way should continue to be used by all the grantees in common, and that the boundary line of the lot conveyed to the defendant operated to give him a right to use the way as appurtenant to his land. *Lefavour* v. *McNulty*, 413.

2. A parcel of land was conveyed to the plaintiff by a deed describing the southeasterly boundary as "a line running longitudinally through the centre of the brick wall between the premises hereby conveyed and the adjoining estate," and in the same deed was granted "the right of use in common with the abutters thereon of a passageway on the southeast boundary as now laid out, about five feet wide, for any and all lawful purposes" At that time there was a continuous brick wall on the southeast boundary of the plaintiff's land, and the only access to the passageway was by a gate through the wall. The owner of the adjoining estate subsequently lowered the grade of the passageway, and the plaintiffs then closed their gate by building a solid wall, and opened a coal-hole through the wall on the passageway on a level with the new grade. *Held*, on a bill in equity to restrain the defendants from changing the grade of the passageway, that even if the opening of the coal-hole was unauthorized, and the use of it on the land covered by the party wall was a trespass, the use of the way by the plaintiffs was rightful ever since the closing of the gate, and that the closing of the gate did not constitute an abandonment. *Held, also*, that if the use of the coal-hole was not only unlawful in itself, but made the use of the passageway in connection with it unlawful, nevertheless such a continuous use of the passage with the knowledge and against the will of the owner of the fee was notice to him, and all concerned, that the plaintiffs' claim on the way was not abandoned. *Held, also*, that if the plaintiffs were bound to take any notice of the acts of strangers to the servient tenement, whose land abuts on one end of the passageway, and who have built on a plan which requires the lowering of the way, such notice was manifested by the maintenance of the coal-hole, and the plaintiffs were entitled to a decree restraining them from so changing the grade. *Vinton* v. *Greene*, 426.

See DEED, 2; LAW OF THE ROAD; TRESPASS, 2.

WIDOW.

See DEVISE AND LEGACY, 2; EQUITY, 5; TRUST FUND.

WILL.

See CHARITY; DEVISE AND LEGACY; EXECUTOR.

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WITNESS.

Evidence offered to contradict a witness in regard to a matter outside of the issue, in which his answers had been drawn out in cross-examination, is rightly excluded. *McLean* v. *Fiske Wharf & Warehouse Co.* 472.

See CONTINUANCE, 1; EVIDENCE, 6, 9, 17, 20; EXPERT; INTOXICATING LIQUORS, 13; NEGLIGENCE, 2, 16.

WORDS.

"Amount." See *Pelton* v. *Baker*, 349, 351.
"And." See *Wood* v. *Seaver*, 411.
"Cohabit." See *Commonwealth* v. *Lucas*, 81, 83.
"Control." See *Sears* v. *Chapman*, 400.
"Creditor." See *Bullard* v. *Moor*, 418, 424.
"Delivery." See *Debinson* v. *Emmons*, 592, 594.
"Dependent." See *Sargent* v. *Knights of Honor*, 557.
"During the time aforesaid." See *Wamesit Power Co.* v. *Sterling Mills*, 435, 448.
"Expose for sale." See *Commonwealth* v. *Byrnes*, 172.
"Form." See *Merrill* v. *Kaulback*, 328, 330.
"For the purposes aforesaid." See *Abbott* v. *Hills*, 396, 398.
"Heirs." See *Lawrence* v. *Crane*, 392; *Holmes* v. *Hancock*, 398; *Wood* v. *Seaver*, 411.
"Inhabitant." See *Boston Investment Co.* v. *Boston*, 461, 462.
"Kept." See *First Congregational Church* v. *Holyoke Mut. Fire Ins. Co.* 475.
"Loss or damage by fire." See *Lynn Gas & Electric Co.* v. *Meriden Fire Ins. Co.* 570.
"Maintenance." See *Sheffield* v. *Parker*, 330, 335.
"More or less." See *Cardinal* v. *Hadley*, 352, 355.
"Now or formerly of." See *Baker* v. *Hall*, 361, 370.
"On both sides." See *Commonwealth* v. *Crane*, 218.
"Or." See *Wood* v. *Seaver*, 411.
"Other terms and conditions remaining the same." See *Baker* v. *Hall*, 361, 370.
"Prison." See *Sturtevant* v. *Commonwealth*, 598.
"Public cemetery." See *Mount Hope Cemetery* v. *Boston*, 509, 517.
"Reasonable cause to know." See *Commonwealth* v. *Joslin*, 482; *Commonwealth* v. *Gould*, 499.
"Situation or circumstances affecting the risk." See *First Congregational Church* v. *Holyoke Mut. Fire Ins. Co.* 475, 478.
"Superintendence." See *Toomey* v. *Donovan*, 232; *Roseback* v. *Ætna Mills*, 379.
"Travelling with carriages." See *Broult* v. *Hanson*, 17.
"Used by the insured on the premises insured." See *First Congregational Church* v. *Holyoke Mut. Fire Ins. Co.* 475.
"Ways, works, or machinery." See *O'Maley* v. *South Boston Gas Light Co.* 135; *Toomey* v. *Donovan*, 232; *Conroy* v. *Clinton*, 318, 320.

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WRIT.

See RAILROAD, 2; TRIAL, 10.

WRIT OF ENTRY.

A testator to whom certain premises were conveyed in 1799, by his will, which was allowed in 1813, gave one half of his property to his only daughter M., "and her heirs born of her body forever," and the other half to his only son J. Upon a petition for partition by J. and M., the premises above mentioned were set off to M. as her share under the will. M. was twice married, and by her first husband had three sons, A., B., and C. M. and her second husband, in 1835, conveyed the premises in mortgage to a certain corporation. M. died in 1845, and by her will she gave the premises in trust for the joint benefit of her sons B. and C., who had the right to terminate the trust, and, upon request, receive a conveyance of the premises discharged of the trust. The trustee was to take the premises subject to the mortgage, which he was to pay; and the mortgage was discharged in 1865. In 1846, A., "in consideration of five dollars" paid to him by the trustee, "and for other good and valuable considerations," conveyed the premises to the trustee, "be my right, title, interest, and estate in and to the said parcels of land, . . . in whatever manner acquired, whether by devise, descent, or otherwise." The deed, which was duly recorded, also recited that the conveyance was made for the further assuring of the title of the trustee under the will of A.'s mother, and for confirming to the trustee a full and absolute estate in fee simple therein, and also for the purpose of ratifying a conveyance of the premises with other parcels which had been made by A. jointly with B. and C. to the trustee earlier in the same year. In 1874, the administrator of the estate of C., who had died, conveyed, under a license from the Probate Court, C.'s estate in the premises to B., and in the same year the trustee under M.'s will conveyed the premises discharged of the trust to B. A. died in 1884, and his oldest son, in 1890, brought a writ of entry against B. to recover the premises. *Held*, that the devise to M. in her father's will created an estate tail, and, on her death, the estate descended to A., her oldest son; that the mortgage given by M. and her husband was immaterial; that the deed of A. in 1846 barred the entail; and that the action could not be maintained. *Collamore* v. *Collamore*, 74.

See EXECUTION, 1; TENANTS IN COMMON.

WRIT OF ERROR.

1. It is not error in a criminal case, that the defendant was tried upon one indictment for four distinct felonies of the same nature, and was convicted of three of the charges by a general verdict upon three counts. *Benson* v. *Commonwealth*, 164.
2. Where a person was tried upon an indictment in four counts for poisoning, and was convicted by a general verdict upon three counts, no inference

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against the verdict is to be drawn, on a writ of error, because, at the time when he was alleged in the indictment to have committed the offences charged in two of these counts, he was confined in jail. *Benson* v. *Commonwealth*, 164.

3. If a person was tried upon an indictment of four counts for poisoning, the acts charged in the third and fourth counts being alleged to have been committed on the same day, upon the last three of which counts he was convicted, this court is not bound to assume, on a writ of error, either that a single offence only was charged, or that the third and fourth counts were different descriptions of the same act. *Ibid.*

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